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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1226

DANIEL SICILIANO, VICTOR ECHAVARRY, JR., and DANIEL GIBSON,

Appellants,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the order and final judgment of the Court of Appeals of the State of New York, filed December 16, 1976, which affirmed the order of the Appellate Division, First Department, filed June 10, 1976, sustaining appellants' conviction in the Supreme Court, Bronx County, of violating New York Penal Law § 195.05 by opening the draws of bridges over navigable waterways.*

Appellants submit this statement to show that the Supreme Court has jurisdiction of this appeal and that substantial federal constitutional questions are presented.

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* The judgments of conviction are set forth as Appendix A, *infra*, pp. 1a-12a. The notice of appeal, filed with the Bronx County Clerk and with the New York Court of Appeals on February 18, 1977, is reproduced as Appendix B, *infra*, pp. 13a-15a.

Opinions Below

The *per curiam* opinion of the New York Court of Appeals, affirming the order of the Appellate Division, is not yet officially reported. It is set forth as Appendix C, *infra*, p. 16a. The order and opinions of the Appellate Division, sustaining, by a divided vote, the conviction of appellants, are officially reported at 52 A.D.2d 408, 384 N.Y.S. 2d 994, and are set forth as Appendix D, *infra*, pp. 17a-41a. No opinion was written by the Supreme Court, Bronx County, at the time of conviction.*

Jurisdiction

This direct appeal challenges the constitutionality of two New York statutes: (1) N.Y. Judiciary Law § 598, which excludes from *all* grand jury service *all* Federal, State, Municipal and other public and quasi-public employees; and (2) N.Y. Penal Law § 195.05, which, as applied, penalized appellants' compliance with the explicit requirement of Federal law and regulation that watercraft on navigable waterways shall at all times be assured free and unobstructed passage. The Courts below upheld the constitutionality of the challenged New York statutes. However, such statutes are repugnant to provisions of the United States Constitution.

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* As later appears, *infra*, pp. 6-7, *prior* to conviction appellants timely moved to dismiss their indictments upon, *inter alia*, the constitutional grounds here presented. The opinions on appellants' unsuccessful pre-conviction motion to dismiss based on the unconstitutionality of New York's grand jury composition statutes and practices are officially reported at 79 Misc.2d 509 (Sup. Ct. Bronx Co. 1974) (n.o.r.), *writ dismissed sub nom.*, 46 A.D.2d 858 (1st Dept. 1974) (n.o.r.), *aff'd*, 35 N.Y.2d 990, 365 N.Y.S.2d 533, 324 N.E.2d 889 (1975). They are set forth, together with the unreported decision on reargument following remand, as Appendix E, *infra*, pp. 42a-66a. The pre-conviction opinion of the Supreme Court, Bronx County, granting, in material part, appellants' motion challenging the underlying penal statute is unreported, but the appellate opinions reversing such grant are officially reported at 40 A.D.2d 818 (1st Dept. 1972) (n.o.r.), *aff'd*, 34 N.Y.2d 575, 354 N.Y.S.2d 945, 310 N.E.2d 542 (1974). Those opinions are set forth as Appendix F, *infra*, pp. 67a-81a.

Jurisdiction of this Court to review the decision below on direct appeal is conferred by 28 U.S.C. § 1257(2). The following decisions recognize such jurisdiction: *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Hoyt* v. *Florida*, 368 U.S. 57 (1961); *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761 (1945).

Statutes Involved

Section 598 of the New York Judiciary Law provides in pertinent part:

"§ 598. *Disqualifications*

Each of the following officers is disqualified to serve as a juror:

* * *

No public officer or employee of the United States government, or of any state, city or municipality, or of any political subdivision of any of them, or of any official board, authority, counsel, commission, corporation or other agency of any of them, receiving annual compensation in excess of one thousand dollars from the aforesaid sources, shall serve on any grand jury." Added L. 1940, c. 202, § 1; amended L. 1942, c. 799, § 5; L. 1943, c. 147, § 1, L. 1951, c. 769, § 1; L. 1953, c. 541, § 1. 29 McKinney's, *Judiciary Law* § 598, pp. 45-46.*

Section 195.05 of the New York Penal Law provides:

"195.05 *Obstructing governmental administration*

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other govern-

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* Section 598 applies to grand jury service in the City of New York. In precisely the same terms, N.Y. Judiciary Law § 664 extends the challenged exclusion throughout the State.

mental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

Obstructing governmental administration is a class A misdemeanor." L.1965, c. 1030. 39 McKinney's, *Penal Law*, § 195.05, p. 395.

33 U.S.C. § 499 provides in pertinent part:

"§ 499. *Regulations for drawbridges, penalties for violation; enforcement*

It shall be the duty of all persons . . . tending the drawbridges built prior to August 18, 1894, or which may thereafter be built across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of Transportation the public interests require to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law. Every such person who shall willfully fail or refuse to open, or cause to be opened, the draw of any such bridge for the passage of a boat or boats, or who shall unreasonably delay the opening of said draw after reasonable signal shall have been given, as provided in such regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $2,000 nor less than $1,000 or by imprisonment (in the case of a natural person) for not exceeding one year, or by both such fine and imprisonment, in the discretion of the court . . ." Aug. 18, 1894, c. 299, § 5, 28 Stat. 362; June 13, 1902, c. 1079, § 6, 32 Stat. 374.

Questions Presented

1. Whether New York's statutory exclusion, pursuant to Judiciary Law § 598, of *all* Federal, State, Municipal and other public and quasi-public employees from *all* grand jury service, is repugnant under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

2. Whether Penal Law § 195.05, as applied, is repugnant under the Fourteenth Amendment to, and Article VI, Section 1, Clause 2, and Article III, Section 2, of the United States Constitution, and whether such penal proscription is valid or applicable under the Federal Supremacy Doctrine where, as here applied, it conflicts with penal proscriptions of Federal law and regulation.

Statement of the Case

Appellants are bridgetenders employed by the City of New York (the "City") to open and close the draws of bridges over navigable waterways.

A vote was pending before the State Legislature on public employee pension legislation. The City and others were opposed to that legislation. Various public employee unions, including appellants' union, called a one-day job action and demonstration in favor of the City's position.

Because of the unique circumstances surrounding the dispute, the State and City deliberately refused to invoke the anti-strike provisions of New York's Taylor Law (N.Y. Civil Service Law § 200 *et seq.*) to enjoin or, later, to punish participation in that scheduled demonstration. However, appellants were cautioned that Federal law and regulation (33 U.S.C. § 499, 33 C.F.R. 117) governed appellants' activities and provided penal sanctions for failure ". . . to open, or cause to be opened, the draws of such

bridges . . . for the [unobstructed] passage of vessels and other watercraft . . .'' (33 USC § 499). Since the drawbridges would be left unattended during the brief period of the demonstration (and otherwise closed to watercraft traffic), appellants, before joining the demonstration, placed the draws of the bridges to which they were assigned in a fixed open position, thereby to assure free passage of watercraft as federal law requires.

The State and City had, as noted, deliberately determined not to invoke the Taylor Law. However, a Bronx County grand jury—from which, pursuant to N.Y. Judiciary Law § 598, *all* public and quasi-public employees were excluded—indicted appellants for their actions in thus complying with Federal mandate.*

Following the entry of not guilty pleas, appellants timely challenged the validity of their indictments upon, *inter alia,* the grand jury exclusion and Commerce Clause-Federal Supremacy grounds noted above.

The challenge to the applicability of the underlying penal statute was first presented. The Supreme Court, Bronx County, granted appellants' dismissal motion in material part, but the Appellate Division reversed and the Court of Appeals affirmed. *People* v. *Siciliano,* 40 A.D.2d 818 (1st Dept. 1972) (n.o.r.), *aff'd,* 34 N.Y.2d 575, 354 N.Y.S. 2d 945, 310 N.E.2d 542 (1974) (Appendix F, *infra,* pp. 67a-81a).

Appellants' grand jury challenges were thereupon rejected by the Bronx County Supreme Court, and the Appellate Division and the Court of Appeals refused at that juncture to grant review upon the ground that appellants' grand jury challenges could not be considered except on

* The grand jury charged appellants with criminal tampering (a Class D felony under Penal Law § 145.20), which, in turn, constituted an essential element of the crimes of obstruction of governmental administration (a Class A misdemeanor under Penal Law § 195.05) and criminal mischief (a Class A misdemeanor under Penal Law § 195.00).

appeal from a judgment of conviction. *People* v. *Echavarry,* 79 Misc.2d 509 (Sup. Ct. Bronx Co. 1974) (n.o.r.), *writ dismissed sub nom. Matter of Siciliano* v. *The Justices of the Supreme Court,* 46 A.D.2d 858 (1st Dept. 1974) (n.o.r.), *aff'd* 35 N.Y.2d 990, 365 N.Y.S.2d 533, 324 N.E.2d 889 (1975) (Appendix E, pp. 42a-60a).* On remand, the grand jury challenge issues were reargued, on consent, in light of this Court's then recent holding in *Taylor* v. *Louisiana, supra,* 419 U.S. 522, but the Bronx County Supreme Court adhered to its prior decision (Appendix E, pp. 61a-66a).

The operative facts having been conceded, and the legal issues having thus been presented and preserved for review,** the proceedings at the trial level were resolved by pleas. *See,* Appendix D, *infra,* pp. 18a-20a, 22a-32a. Each appellant was sentenced to a $1,000 fine and a three-year term of probation. Appendix A, *infra,* pp. 1a-12a.

The Appellate Division affirmed appellants' convictions by a divided vote, holding, *inter alia,* that: (a) the Judiciary Law § 598 exclusion of all public and quasi-public employees from all grand jury service is constitutional; and (b) the underlying penal statute is not repugnant to the Commerce Clause or pre-empted under the Supremacy Doctrine. *People* v. *Siciliano, supra,* 52 A.D.2d 408, 384 N.Y.S.2d 994. *See,* Appendix D, *infra,* pp. 18a-41a.***

* The organization representing the City's various public employee unions, a number of those unions and various of their officers, sought, *unsuccessfully,* to join in challenging, on behalf of their membership, the statutory bar against *all* grand jury service by *all* governmental employees. *See,* Appendix E, *infra,* pp. 58a-59a.

** Under N.Y. Criminal Procedure Law § 210.20(2) the challenge must, as here, be made prior to the imposition of sentence. *See, Langella* v. *Com'r of Corrections, State of N.Y.,* 413 F. Supp. 1214, 1216-17 (S.D.N.Y.), *aff'd,* 545 F.2d 818 (2d Cir. 1976). Additionally, the challenge here was explicitly preserved on the record (*see,* Appendix D, *infra,* pp. 26a-28a, fns. 2-4, 20a, 40a).

*** The Appellate Division also rejected, by a divided vote, appellants' grand jury challenge based on acknowledged intentional

(footnote continued on following page)

The Court of Appeals affirmed *per curiam*, stating that ". . . the Court is not persuaded by any of defendants' contentions." Appendix C, *infra*, p. 16a.*

Appellants' notice of appeal to this Court was duly served and filed on February 18, 1977. Appendix B, *infra*, pp. 13a-15a.**

The Questions Are Substantial

I.

The Grand Jury Class Exclusion Issues

While the right of a State criminal defendant to indictment by grand jury is not guaranteed by the United States Constitution [*Hurtado* v. *California*, 110 U.S. 516 (1884)], ". . . if a State chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury." *Peters* v. *Kiff*, 407 U.S. 493, 501 (1972); *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320, 330 (1970).

(footnote continued from preceding page)

and systematic sex discrimination practices. The majority opinion concluded that this challenge was not cognizable on review or by way of evidentiary hearing because, though the practice was acknowledged and appellants' counsel had been authorized by the excluding authority to represent that fact to the Court, it was not sufficiently supported in the absence of an affidavit of that excluding authority, or, as an alternative ground, because that particular challenge had been waived by appellants' pre-arranged guilty plea. *See*, Appendix D, *infra*, pp. 18a-22a.

* In the Court of Appeals, the Attorney General intervened in support of the People's position. *See*, Appendix G, *infra*, p. 82a.

** On January 14, 1977, appellants moved the Court of Appeals for amendment of the remittitur or for reargument solely to clarify and correct separable and unrelated questions respecting the validity and applicability of certain of the conditions of probation imposed at sentencing. *See*, Appendix D, *infra*, pp. 39a-40a. That motion was denied on February 15, 1977. Appendix H, *infra*, p. 83a.

Indictment by a validly constituted grand jury is a "fundamental" right, as well as a jurisdictional prerequisite, under Article 1, Section 6, of the New York State Constitution. *Simonson* v. *Cahn*, 27 N.Y.2d 1, 3-4 (1970); *People* v. *Prior*, 294 N.Y. 405, 413 (1945) (concurring opinion); *People ex rel. Battista* v. *Christian*, 249 N.Y. 314, 318 (1928). New York having thus opted to utilize the grand jury system, Fourteenth Amendment Due Process and Equal Protection guarantees automatically attach, particularly the right to a properly constituted grand jury. *Peters* v. *Kiff*, *supra*, 407 U.S. at 501; *Alexander* v. *Louisiana*, 405 U.S. 625, 635-637 (1972) (concurring opinion); *Carter* v. *Jury Commission of Greene County*, *supra*, 396 U.S. at 330.

N.Y. Judiciary Law § 598 excludes from *all* grand jury service *all* Federal, State, Municipal and other governmental and quasi-governmental employees.* The sweeping class exclusion thus statutorily decreed rests upon the notion that, solely by reason of the generality of their employment, all such persons are conclusively presumed to be biased and unfit for service. *People* v. *Echavarry*, *supra*, 79 Misc.2d at 510-12 (Appendix E, *infra*, pp. 45a-47a). *See*, *Sixth Annual Report, Judicial Council of the State of New York*, Legislative Document No. 48 (1940).

The issue here tendered is whether the sweeping bar of § 598 abridges Due Process and Equal Protection. The Courts below, ignoring Fourteenth Amendment protections, sustained the constitutionality of § 598, reasoning: (1) the validity of that sweeping exclusion ". . . is subject to a 'rational basis' test and not a 'strict scrutiny' test" (Appendix D, *infra*, p. 35a); (2) thus posited, "'. . . rational people could surely entertain the broad underlying premise that those dependent upon government

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* Pursuant to interpretative opinion of the State Attorney General, the § 598 bar has been extended to public service volunteers (*e.g.*, auxiliary fireman) and even to certain employees of cultural institutions. 1960 N.Y. Attorney Gen'ls. Rep. 181; 1942 Attorney Gen'ls. Rep. 383.

for substantial income might be unsuitably conflicted if they served as jurors' " (Appendix E, *infra*, p. 46a); and (3) the requirement that there be, at least, the possibility that the jury can be drawn from a fair cross section of the community applies only to petit and not grand juries and, since ". . . public employees may serve on a petit jury in this State . . . [,] there is no Sixth Amendment violation of an impartial jury trial therefore emanating from section 598 of the Judiciary Law." (Appendix D, *infra*, p. 34a; *see*, Appendix E, *infra*, pp. 46a-49a).

We show below that § 598 abridges Fourteenth Amendment Due Process and Equal Protection guarantees, that the contrary State Court holdings herein conflict with rulings of this Court and that important constitutional questions are presented.

(a)

This Court has repeatedly held that wholesale jury exclusion of governmental employees predicated upon the notion that they are presumptively biased is without any rational foundation and constitutes "a serious reproach" to the administration of justice. *United States* v. *Wood*, 299 U.S. 123, 151 (1936). *Accord, Dennis* v. *United States*, 339 U.S. 162 (1950); *Frazier* v. *United States*, 335 U.S. 497 (1948).

Thus, in *Wood*, it was the defendants, arguing for *en masse* jury exclusion of all governmental employees, who unsucessfully advanced the presumptive bias notion which underlies § 598. Chief Justice Hughes, writing for this Court, rejected that endeavor, stating: ". . . the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation." *Supra*, 299 U.S. at 149. That view, which the New York Courts have here rejected, has historic roots in the English com-

mon law and colonial precedents. *See, e.g., United States* v. *Wood, supra*, 299 U.S. at 134-139, 140, n. 9; *Hargrave's Coke upon Littleton*, I, 156. *See also, State* v. *Lewis*, 50 Nev. 212, 224 (1927); *State* v. *Cosgrove*, 16 R.I. 411, 412 (1889).*

Moreover, this Court's conclusion that the sweeping exclusion of all governmental employees is "without any rational foundation" is particularly apposite when it is noted that, while § 598 bars all governmental and quasi-governmental employees from all grand jury service (*i.e.*, in all cases, ranging from rape to burglary), that self-same class is *mandated* to serve as petit jurors.** No rational foundation exists for such statutory caprice. After all, if a federal postal clerk is unfit, based upon an irrebuttable presumption of bias, to determine as a grand juror whether a sufficient basis exists for the prosecution of rape or burglary charges, what circumstance magically cleanses him of that disability when it comes to the more serious judgment of guilt or innocence?

(b)

The obvious conflict noted above, important as it is, pales in significance, however, with the more serious departure from basic principles which New York has here decreed, *viz.*, that the fair cross sectional jury require-

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* Such historic rejection of the presumptive bias notion also comports with this Court's repeated declaration that "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments . . . [or, stated otherwise,] 'a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment' ". *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973), quoting *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932). *Accord, Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

** *See*, Appendix D, *infra*, p. 34a. Certain essential personnel (*e.g.*, policemen and firemen) are statutorily entitled to claim an *exemption*, if so inclined. N.Y. Judiciary Law § 599. That limited optional *exemption* is not challenged.

ment does not extend to grand juries, but is limited to petit juries, apparently on the theory that that right is protected only by Sixth Amendment and not Fourteenth Amendment guarantees. *Supra*, 52 A.D.2d at 419-20; *supra*, 79 Misc.2d at 513; Appendices D and E, *infra*, pp. 34a-35a, 47a-49a, respectively.

Fourteenth Amendment guarantees mandate, at least, the possibility of a jury drawn from a fair cross section of the community. *Taylor* v. *Louisiana, supra,* 419 U.S. 522; *Peters* v. *Kiff, supra,* 407 U.S. 493; *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217 (1946). Such guarantees, this Court has held, extend to grand juries where states, like New York, have opted to utilize that system. *Peters* v. *Kiff, supra,* 407 U.S. at 501-503; *Carter* v. *Jury Commission of Greene County, supra,* 396 U.S. at 330; *Pierre* v. *Louisiana,* 306 U.S. 354, 362 (1939). *See, Turner* v. *Fouche,* 396 U.S. 346, 355 (1970); *Brown* v. *Allen,* 344 U.S. 443, 470-474 (1953).

Any selection process that precludes the possibility that the jury, grand or petit, ultimately drawn can be fairly representative of a cross-section of the community ". . . contravenes the very idea of a jury—'a body truly representative of the community', composed of 'the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.' " *Carter* v. *Jury Commission of Greene County, supra,* 396 U.S. at 330. *See, Quadra* v. *Superior Ct. of City and Cty. of San Francisco,* 403 F. Supp. 486 (N.D. Cal. 1975).

"These principles", Justice Marshall observed, "compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner . . ." *Peters* v. *Kiff, supra,* 407 U.S. at 502. And that result occurs, and due process is abridged, "[w]hen *any* large and identifiable segment of the community is excluded from jury service . . . ." *Id.* at 503 (emphasis supplied).*

The purpose of a grand jury, where that system is utilized, is to place in the hands of the citizenry and not the prosecutor the right to determine whether any prosecution and or further action is warranted and, like petit juries, "[t]his prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Taylor* v. *Louisiana, supra,* 419 U.S. at 530, and 532, n. 12.

The decision below ignores those holdings of this Court and, to compound the constitutional error thus worked, disregards the Fourteenth Amendment requirement that ". . . the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor* v. *Louisiana, supra,* 419 U.S. at 538.

(c)

This Court's recognition of the cross-sectionalism requirement, discussed above, is also implicit in its repeated holdings that, in jury selection, sweeping class exclusions, as contrasted with *individualized* disqualifications, are never permissible under Due Process and Equal Protection criteria. Yet, the Courts below rejected these criteria.

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* The group or class statutorily excluded by § 598 is, manifestly, a cognizable one. The excluded group comprises in excess of 18% of the otherwise qualified jury population. More importantly, the separate status, indeed the readily identifiable and discernible nature, of the excluded class is shown by § 598, which statutorily singles out that group and excludes it from service. *See, Thiel* v. *Southern Pacific Co., supra,* 328 U.S. 217; *United States* v. *Wood, supra,* 299 U.S. at 149-151.

"Jury competence is an individual rather than a group or class matter." *Thiel* v. *Southern Pacific Co., supra,* 328 U.S. at 220. *Accord, Taylor* v. *Louisiana, supra,* 419 U.S. at 534. Class exclusions, having no relationship to permissible ". . . qualifications of age and educational attainment . . . good intelligence, sound judgment, and fair character" have nothing to commend them. *Carter* v. *Jury Commission of Greene County, supra,* 396 U.S. at 332. *See also, Thiel* v. *Southern Pacific Co., supra,* 328 U.S. at 223-224.*

"Indictment by Grand Jury and trial by jury", this Court has held, "cease to harmonize with traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded from jury service." *Pierre* v. *Louisiana,* 306 U.S. at 358. The logic is simple. First, "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters* v. *Kiff, supra,* 407 U.S. at 504. Second, sweeping class exclusions ". . . create the appearance of bias in the decision of individual cases, and they create the risk of actual bias as well." *Id.* at 502. Third, exclusionary tendencies, no matter how slight, are "undermining processes", which because they weaken our institutions and impinge on an "essential right", must be "sturdily resisted", even though "the motives influencing such tendencies may be of the best." *Glasser* v. *United States,* 315 U.S. 60, 85-86 (1942). These constitutionally-protected principles were disregarded below.

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* And that is particularly true in view of the fact that, by statute, New York permits *individualized* grand jury disqualification for cause on a case-by-case basis. *See, e.g.,* N.Y. Criminal Procedure Law § 190.20(2); N.Y. Judiciary Law §§ 593(1), 609 (4); Rules, N.Y. App. Div., 1st Dept., § 620.24.

(d)

In rejecting the above-cited rulings of this Court, the New York courts held that, so long as some rational basis can be discerned to support the classification, the usual presumption favoring constitutionality suffices to validate the statute. That view likewise conflicts with holdings of this Court.

Application of the rational basis test would permit the State to exclude from grand jury service virtually any segment of the community so long as the State in its exclusion process did not confine such exclusion to a suspect category (*e.g.,* race). For example, day laborers, students, religious sects, union members and like distinctive segments of the community could be excluded *en masse* under that hypothesis.* Thus, the rational basis test fails to take into account the affirmative right of a criminal defendant not to be indicted by a grand jury from which any identifiable and distinctive group has been excluded, and, as here, it also deprives members of the excluded group of any opportunity to challenge the deprivation of their right to serve (see, *supra,* fn.*, p. 7). That result conflicts with this Court's prior decisions. *E.g., Peters* v. *Kiff, supra,* 407 U.S. 493; *Carter* v. *Jury Commission of Greene County, supra,* 396 U.S. 320.

"The right to a proper jury cannot be overcome on merely rational grounds" *Taylor* v. *Louisiana, supra,* 419 U.S. at 534. If a distinctive class is to be excluded,

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* This Court and other Federal and State Courts have, however, rejected that myopic view of constitutional guarantees. *Thiel* v. *Southern Pacific Co., supra,* 328 U.S. at 220; *Labat* v. *Bennett,* 365 F.2d 698, 723-24 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967) [day laborers]; *Anderson* v. *Casscles,* 531 F.2d 682 (2d Cir. 1976) [students]; *State* v. *Madison,* 240 Md. 265 (1965) [certain non-established religious sects]; *Quadra* v. *Superior Ct. of City and Cty. of San Francisco,* 378 F. Supp. 605 (N.D. Cal. 1974) [blue collar workers]; *State* v. *Cosgrove, supra,* 16 R.I. 411 [Town Constables].

"[t]here must be weightier reasons . . ." to support such exclusion. *Ibid.* After all, as Justice (then Judge) Blackmun observed in *Bailey* v. *Henslee,* 287 F.2d 936, 941 (8th Cir. 1961), ". . . a jury's proper composition is fundamental. . . ." *See, Peters* v. *Kiff, supra,* 407 U.S. at 501. *See also,* Van Dyke, *Jury Service is a Fundemental Right,* 2 Hastings Constitutional Law Quarterly, 27-30 (1975). Hence, any abridgment of that "fundamental" right must be judged by application of the "strict scrutiny" or "compelling state interest" test and not, as here, by application of a mere rational basis standard. *Dunn* v. *Blumstein,* 405 U.S. 330, 337 (1973); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

In any event, however, § 598 is wholly "without any rational foundation" *United States* v. *Wood, supra,* 299 U.S. at 149. *Accord, Dennis* v. *United States, supra,* 339 U.S. 162. *See, supra,* pp. 10-11.*

(e)

Finally, while this Court has ruled that personal prejudice need not be shown to support a challenge to improper jury composition [*Taylor* v. *Louisiana, supra,* 419 U.S. at 526; *Peters* v. *Kiff, supra,* 407 U.S. 493], such prejudice is present here.

Appellants are public employees. As a class, all of their socio-economic peers are singled out and excluded

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* To repeat, if presumptive bias rationally disqualifies *all* governmental employees from grand jury service, *rational* processes would dictate their disqualification from petit jury service; yet, they are *mandated* to serve as petit jurors. Similarly, if the receipt of moneys from any governmental source is the vice (*see,* Appendix E, *infra,* p. 46a), what rationally distinguishes the receipt of such funds as "compensation" from their receipt as subsistence or like governmental payments, or, even their receipt as "compensation" from a private sector employer wholly dependent on public funds (*e.g.,* defense contractors)? And if the vice lies in the nature of some particular grand juries or their activities (*e.g.,* investigatory inquiries), what rational basis exists for extending the exclusion to *all* service on *all* grand juries?

by § 598. Not only is the fair cross-sectional requirement thus abridged, appellants have been denied a jury which under any circumstances, could be drawn from a pool including their peers. That, of itself, is proscribed. *Carter* v. *Jury Commission of Greene County, supra,* 396 U.S. at 330; *Thiel* v. *Southern Pacific Co., supra,* 328 U.S. at 223-224.*

(f)

It remains only to note that the decision below is not a mere aberration. It is the precedent repeatedly cited to support the sweeping class exclusion of § 598 and of other like exclusions as well. *E.g., Democratic Committee of Bronx County* v. *Nadjari,* N.Y.L.J., March 30, 1976, p. 5, col. 1 (Sup. Ct. N.Y. Co), *aff'd,* 52 A.D.2d 70 (1st Dept. 1976); *People* v. *Scafuri,* 87 Misc.2d 797, 800 (Dutchess Co. Ct. 1976).

II.

The Commerce Clause-Supremacy Issues

The second issue tendered is whether a State law which, as applied, penalizes compliance with the requirement of Federal law and regulation that unobstructed passage of watercraft shall at all times be assured is repugnant to Constitutional strictures, particularly the Commerce Clause,

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* Apt therefore is the prophetic observation in *Fay* v. *New York,* 332 U.S. 261, 293 (1947), that, whatever excuse may exist for discriminating against any laboring class (*e.g., public employees*), such discrimination cannot possibly be justified in the context of a labor dispute like this:

> "There may be special cases where *exclusion of laborers would indicate that those sitting were prejudiced against labor defendants, as where a labor leader is on trial on charges growing out of labor dispute.* The situation would be similar to that of a Negro who confronts a jury on which no Negro is allowed to sit." (Emphasis supplied.)

and is pre-empted under the Supremacy Clause. The decision below ignores such Constitutional strictures and holds that, despite the fact it was a ruling of this Court which resulted in explicit Congressional action displacing the State's exercise of police power, the State nonetheless may punish compliance with that Federal law as a violation of State law (Appendix D, *infra*, pp. 24a-26a).*

Long ago this Court held that the power to regulate navigation along all interstate waterways was vested in Congress under the Commerce Clause. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Furthermore, Article III, Section 2, of the Constitution was early construed as a source of Federal legislative power as well. *See, The Propeller Genessee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443 (1851). *See also*, Note, *"From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century"*, 67 Harv. L. Rev. 1214 (1954). This Court thus has held that where State legislation conflicts, by its terms *or as applied*, with Federal law or regulation, particularly in the area of navigation and trade, the State law must give way. *Sinnot* v. *Davenport*, 63 U.S. (22 How.) 227 (1859). *See also, Southern Pacific Co.* v. *Arizona, supra*, 325 U.S. at 766; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 156 (1942). *See, DeCanas* v. *Bica*, 424 U.S. 351 (1976). Nonetheless, New York here maintained the right to punish compliance with Federal requirements mandating the unobstructed passage of water-

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* The Courts below treated this issue simply in terms of whether the State and Federal enactments conflict on their face, ignoring completely the conflict which here resulted from *application* of the State statute to punish compliance with Federal mandate. *See*, Appendix D, *infra*, pp. 24a-26a. Thus posited, the Courts below held that the State and Federal enactments can "coexist". *Id.* at p. 26a. We do not dispute the possibility of such coexistence in the abstract; our quarrel is with the *application* of this State law either to hinder or to punish compliance with Federal mandate.

craft, solely because such compliance was at the expense of State-regulated surface traffic.

In *Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago*, 107 U.S. 678 (1883), the validity of a Chicago ordinance requiring the closing at specified times of drawbridges over navigable waterways was sustained by this Court *only* because, at that juncture, Congress had not legislated with respect thereto. To fill that void, Congress enacted the predecessor to 33 U.S.C. § 499 [c. 299, § 5, 28 Stat. 362, Aug. 18, 1894]. *Omaha Packing Co.* v. *Pittsburgh, F.W. & C. Ry. Co.*, 120 F.2d 594, 597 (7th Cir.), *cert. denied*, 314 U.S. 645 (1941); *City of Milwaukee* v. *American S.S. Co.*, 76 F.2d 343, 344 (7th Cir.), *cert. denied*, 296 U.S. 591 (1935). And, as both the *Omaha* and *Milwaukee* decisions make clear, indeed, as this Court ruled in *Escanaba*, preemption thereby followed. *See also, United States* v. *Village of Little Chute*, 248 F.2d 228 (7th Cir. 1957); *United States* v. *Outagamie County*, 132 F. Supp. 481 (E.D. Wisc. 1955).

The decision below not only conflicts with the above principles, it contravenes the constitutionally-decreed supreme Federal mandate ". . . that navigation rights take priority over the rights of surface traffic" [*Erie Lackawanna Ry. Co.* v. *Timpany*, 495 F.2d 830, 833 (2d Cir. 1974)] and that the effect of Federal law or regulation is to withdraw from the States ". . . what would otherwise have been a permissible area [of State regulation] . . . ." *Petition of Kinsman Transit Co.*, 338 F.2d 708, 718 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965). *See also, Pennsylvania Railroad Co.* v. *S.S. Marie Leonhardt*, 320 F.2d 262, 267 (3rd Cir. 1963); *Hagan* v. *Dept. of Highways, State of Louisiana*, 368 F.Supp. 446 (M.D. La. 1973), *aff'd*, 496 F.2d 1405 (5th Cir. 1974).

The decision below, conflicting as it does with the above-noted holdings of this Court and other Federal courts, as well as Constitutional strictures and requirements of Federal law, presents a substantial question meriting review.

CONCLUSION

For each of the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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March 3, 1977

Of Counsel:

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STROOCK & STROOCK & LAVAN
ALAN KOLOD
KAREN E. WAGNER
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New York, New York

APPENDIX

Appendix A, Judgment.

SUPREME COURT OF THE STATE OF NEW YORK

Part 24 County Bronx

Conditions of Probation

410.10 CPL, 65.10 PL

Supreme Court Number/Year 2865-71

The People of the State of New York

vs.

Daniel Siciliano
Defendant

Date 2/27/76

Present:

The Honorable WILLIAM J. DROHAN
Justice

The above named defendant having been

☒ convicted of the crime of Obstructing governmental administration P.L. 195.05.

☐ found to be a youthful offender for the criminal act of .....
in the criminal action entitled above to cover & exclude 2720-72 and having been sentenced to:

☐ a ..... term of imprisonment, and to

☒ a 3 year period of Probation to expire on ..... unless terminated sooner in accordance with the Criminal Procedure Law,

☐ and to pay a fine in the amount of $1000.00.

It is

ORDERED, that during the period of Probation the defendant shall comply with the following conditions and any other conditions which the Court may impose at any time prior to the expiration or termination of the period of Probation.

1. ☐ Report immediately to Bronx Probation Dept.

   ☐ Upon release from custody report immediately to .....

2. Permit the Probation Officer to visit him at his home and elsewhere.

3. Do not leave New York City unless granted permission to do so by the Court or the Probation Officer.

4. Promptly notify the Probation Officer of any change in address or employment.

5. Promptly notify the Probation Officer if arrested or if questioned by any law enforcement official.

6. Answer all reasonable inquiries by the Probation Officer.

7. Lead a law abiding life. Not violate any federal, state, or local law.

8. Refrain from frequenting unlawful or disreputable places.

9. Refrain from consorting with disreputable persons.

10. Keep reasonable hours.

11. Avoid injurious or vicious habits.

12. Refrain from the use of illegal drugs.

    Submit to chemical testing for the use of drugs as directed by the Court or the Probation Officer.

13. Refrain from the excessive use of alcoholic beverages.

14. Undergo medical, psychiatric, or other appropriate treatment and remain in a specified institution, when required for that purpose, if so directed by the Court or the Probation Officer.

15. Work faithfully at a suitable employment approved by the Probation Officer or

    Pursue a course of study or of vocational training approved by the Probation Officer.

    Submit proof of such employment, study, or training as required by the Probation Officer.

16. Support his dependents and meet all other family responsibilities.

17. ☒ Pay the fine imposed ☐ Make restitution
    ☐ Make reparation

    In the amount of $1,000.00.

    In the following manner: The payment of the fine is deferred pending the outcome of an appeal on the sentence.

18. Not to take any promotional exams for the next three years, or to accept any on the job promotions.

19. Obey the directions given by the Probation Officer to insure compliance with these conditions of Probation.

s/ WJD

WILLIAM J. DROHAN
Justice of the Supreme Court of the
State of New York

Appendix A, Judgment.

ACKNOWLEDGMENT

I have this day received a copy of the Conditions of the Sentence of Probation in my case.

I have read or have had read to me the Conditions of the Sentence of Probation in my case.

I understand the Conditions and do hereby agree to comply with them.

I understand that the Court may, at any time prior to the expiration or termination of the period of Probation, modify or enlarge the conditions or, if I commit an additional offense, other than a traffic infraction, or violate a condition, revoke the sentence of Probation.

2/27/76
Dated: City of New York

s/ DANIEL SICILIANO
Defendant (Signature)

495 Adler Pl. Bronx NY 12475
(Address)

EDWARD MOYRA CCD
Witness (Court Clerk) Signature

Appendix A, Judgment.

SUPREME COURT OF THE STATE OF NEW YORK

Part 24 County Bronx

Conditions of Probation

410.10 CPL—65.10 PL

Supreme Court Number/Year 2866—71

The People of the State of New York

vs.

VICTOR ECHAVARRY
Defendant

Date 2-27-76

The Honorable WILLIAM J. DROHAN
Justice

The above named defendant having been

☒ convicted of the crime of Obstructing Governmental Administration P.L. 195.05.

☐ found to be a youthful offender for the criminal act of .....
in the criminal action entitled above to cover & exclude 2721-72 and having been sentenced to:

☐ a ..... term of imprisonment, and to

☒ a 3 year period of Probation to expire on .....
unless terminated sooner in accordance with the Criminal Procedure Law,

☐ and to pay a fine in the amount of $1000.00.

It is

ORDERED, that during the period of Probation the defendant shall comply with the following conditions and any other conditions which the Court may impose at any time prior to the expiration or termination of the period of Probation.

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   ☐ Upon release from custody report immediately to .....

2. Permit the Probation Officer to visit him at his home and elsewhere.
3. Do not leave New York City unless granted permission to do so by the Court or the Probation Officer.
4. Promptly notify the Probation Officer of any change in address or employment.
5. Promptly notify the Probation Officer if arrested or if questioned by any law enforcement official.
6. Answer all reasonable inquiries by the Probation Officer.
7. Lead a law abiding life. Not violate any federal, state, or local law.
8. Refrain from frequenting unlawful or disreputable places.
9. Refrain from consorting with disreputable persons.
10. Keep reasonable hours.
11. Avoid injurious or vicious habits.
12. Refrain from the use of illegal drugs.

    Submit to chemical testing for the use of drugs as directed by the Court or the Probation Officer.

13. Refrain from the excessive use of alcoholic beverages.
14. Undergo medical, psychiatric, or other appropriate treatment and remain in a specified institution, when required for that purpose, if so directed by the Court or the Probation Officer.
15. Work faithfully at a suitable employment approved by the Probation Officer or

    Pursue a course of study or of vocational training approved by the Probation Officer.

    Submit proof of such employment, study, or training as required by the Probation Officer.
16. Support his dependents and meet all other family responsibilities.
17. ☒ Pay the fine imposed ☐ Make restitution ☐ Make reparation

    In the amount of $1,000.00.

    In the following manner: The payment of the fine is deferred pending the outcome of an appeal on the sentence.
18. Not to take any promotional exams for the next three years, or to accept any on the job promotions.
19. Obey the directions given by the Probation Officer to insure compliance with these conditions of Probation.

s/ WJD
WILLIAM J. DROHAN
Justice of the Supreme Court of the
State of New York

Appendix A, Judgment.

ACKNOWLEDGMENT

I have this day received a copy of the Conditions of the Sentence of Probation in my case.

I have read or have had read to me the Conditions of the Sentence of Probation in my case.

I understand the Conditions and do hereby agree to comply with them.

I understand that the Court may, at any time prior to the expiration or termination of the period of Probation, modify or enlarge the conditions or, if I commit an additional offense, other than a traffic infraction, or violate a condition, revoke the sentence of Probation.

Dated: 2/27/76 City of New York

VICTOR J. ECHAVARRY
Defendant (Signature)

1952 O'Brien Ave. Bx.
(Address)

EDWARD MOYRA CCD
Witness (Court Clerk) Signature

Appendix A, Judgment.

SUPREME COURT OF THE STATE OF NEW YORK

Part 24 County Bronx

Conditions of Probation

410.10 CPL—65.10 PL

Supreme Court Number/Year 2867—71

The People of the State of New York

vs.

Daniel Gibson
Defendant

Date 2-27-76

Present:

The Honorable WILLIAM J. DROHAN
Justice

The above named defendant having been

☒ convicted of the crime of Obstrucing Governmental Administration P.L. 195.05.

☐ found to be a youthful offender for the criminal act of .....
in the criminal action entitled above to cover & exclude 2722-72 and having been sentenced to:

☐ a ..... term of imprisonment, and to

☐ a 3 year period of Probation to expire on ..... unless terminated sooner in accordance with the Criminal Procedure Law,

☐ and to pay a fine in the amount of $1000.00.

It is

ORDERED, that during the period of Probation the defendant shall comply with the following conditions and any other conditions which the Court may impose at any time prior to the expiration or termination of the period of Probation.

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   ☐ Upon release from custody report immediately to .....

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4. Promptly notify the Probation Officer of any change in address or employment.

5. Promptly notify the Probation Officer if arrested or if questioned by any law enforcement official.

6. Answer all reasonable inquiries by the Probation Officer.

7. Lead a law abiding life. Not violate any federal, state, or local law.

8. Refrain from frequenting unlawful or disreputable places.

9. Refrain from consorting with disreputable persons.

10. Keep reasonable hours.

11. Avoid injurious or vicious habits.

12. Refrain from the use of illegal drugs.

    Submit to chemical testing for the use of drugs as directed by the Court or the Probation Officer.

13. Refrain from the excessive use of alcoholic beverages.

14. Undergo medical, psychiatric, or other appropriate treatment and remain in a specified institution, when required for that purpose, if so directed by the Court or the Probation Officer.

15. Work faithfully at a suitable employment approved by the Probation Officer or

    Pursue a course of study or of vocational training approved by the Probation Officer.

    Submit proof of such employment, study, or training as required by the Probation Officer.

16. Support his dependents and meet all other family responsibilities.

17. ☒ Pay the fine imposed ☐ Make restitution
    ☐ Make reparation

    In the amount of $1,000.00.

    In the following manner: The payment of the fine is deferred pending the outcome of an appeal on the sentence.

18. Not to take any promotional exams for the next three years, or to accept any on the job promotions.

19. Obey the directions given by the Probation Officer to insure compliance with these conditions of Probation.

s/ WJD
WILLIAM J. DROHAN
Justice of the Supreme Court of the
State of New York

Appendix A, Judgment.

ACKNOWLEDGMENT

I have this day received a copy of the Conditions of the Sentence of Probation in my case.

I have read or have had read to me the Conditions of the Sentence of Probation in my case.

I understand the Conditions and do hereby agree to comply with them.

I understand that the Court may, at any time prior to the expiration or termination of the period of Probation, modify or enlarge the conditions or, if I commit an additional offense, other than a traffic infraction, or violate a condition, revoke the sentence of Probation.

2/27/76
Dated: City of New York

s/ DANIEL GIBSON
Defendant (Signature)

72-13 Myrtle Ave., Queens
(Address)

EDWARD MOYRA, CCD
Witness (Court Clerk) Signature

Appendix B, Notice of Appeal.

COURT OF APPEALS
OF THE STATE OF NEW YORK

Filed
In Office of County Clerk,
Bronx County
February 18, 1977

—and—

Office of Clerk
Court of Appeals
February 18, 1977

DANIEL SICILIANO, VICTOR ECHAVARRY, JR.,
and DANIEL GIBSON,

Appellants,

—against—

THE STATE OF NEW YORK,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Daniel Siciliano, Victor Echavarry, Jr. and Daniel Gibson, the appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, entered herein on December 16, 1976, affirming the order of the Appellate Division, First De-

partment, filed June 10, 1976, sustaining the judgment of conviction of the appellants.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, New York
February 18, 1977

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Appendix C, Decision and Order of the Court of Appeals.

COURT OF APPEALS,
STATE OF NEW YORK

1 No. 570

The People, &c.,
Respondent,
vs.
Daniel Siciliano,
Appellant.

The People, &c.,
Respondent,
vs.
Victor Echavarry, Jr.,
Appellant.

The People, &c.,
Respondent,
vs.
Daniel Gibson,
Appellant.

Order affirmed. On the issues raised both with respect to the waiver of defects with respect to the pleas of guilty and those raised under the Federal Constitution, the State Constitution and the statutes, the Court is not persuaded by any of defendants' contentions.
All concur.

Appendix D, Order of Appellate Division.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 10, 1976.

Present—Hon. ARTHUR MARKEWICH, Justice Presiding,
THEODORE R. KUPFERMAN,
VINCENT A. LUPIANO,
HAROLD BIRNS,
LOUIS J. CAPOZZOLI,
Justices.

2416

The People of the State of New York,
Respondent,
-against-
Daniel Siciliano,
Defendant-Appellant.

2417

The People of the State of New York,
Respondent,
-against-
Victor Echavarry, Jr.,
Defendant-Appellant.

2418

The People of the State of New York,

Respondent,

-against-

Daniel Gibson,

Defendant-Appellant.

Appeals having been taken to this Court by the defendants-appellants from three judgments of the Supreme Court, Bronx County (Drohan, J.), each rendered February 27, 1976, convicting defendants, upon their pleas of guilty, of the crime of obstructing governmental administration (P. L. sec. 195.05) and sentencing each of them to a period of probation of three years and a fine of one thousand dollars,

And said appeals having been argued by Mr. Charles G. Moerdler of counsel for defendants-appellants, and by Mr. Stephen R. Bookin of counsel for respondent; and due deliberation having been had thereon, and upon the Opinions filed herein,

It is ordered that the judgments so appealed from be and the same hereby are affirmed.

[Judgments of conviction affirmed in opinion by Birns, J.; Markewich and Capozzoli, JJ., in a separate partially concurring and partially dissenting opinion, concur with Birns, J., as to affirmance, as to constitutionality of Section 598 Judiciary Law and as to the absence of a sufficient

record to present for appellate review question of existence of a constitutionally discriminatory practice excluding women from service on grand juries, but dissent insofar as to hold that defendants-appellants' pleas of guilty constitute a waiver of any prior infirmities in the procedures theretofore had; Lupiano, J., in a separate partially concurring and partially dissenting opinion, concurs with Birns, J., that defendants-appellants by their pleas of guilty did not waive constitutional challenge to the indicting grand jury and as to constitutionality of Section 598 Judiciary Law, but dissents in part, holding that the question of existence of discriminatory practices excluding women from grand juries should be remanded for hearing, and also that there should be remand of defendants-appellants for resentence in respect of conditions of probation; Kupferman, J., in a separate partically concurring and partially dissenting opinion, concurs with Birns, J., that defendants-appellants' pleas of guilty did not constitute a waiver of prior infirmities, but dissents to hold Section 598 Judiciary Law unconstitutional, requiring reversal of convictions and dismissal of indictments.]

Enter:

Hyman W. Gamso
Clerk.

Appendix D, Opinions of Appellate Division.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DANIEL SICILIANO, VICTOR ECHAVARRY, JR., and DANIEL GIBSON, Appellants.

First Department, June 10, 1976

APPEALS from judgments of the Supreme Court (WILLIAM J. DROHAN, J.), rendered February 27, 1976 in Bronx County, convicting defendants upon their pleas of guilty, of the crime of obstructing governmental administration and sentencing each of them to a period of probation of three years and a fine of $1,000.

Charles G. Moerdler of counsel (*Henry J. Silberberg, Alan Kolod* and *Irving Anolik* with him on the brief; *Morris Weissberg,* attorney), for appellants.

Stephen R. Bookin of counsel (*Mario Merola, District Attorney*), for respondent.

BIRNS, J. I agree that defendants by their plea of guilty as disclosed by the record in this case did not waive a possible challenge to the constitutionality of section 598 of the Judiciary Law. I further concur in the carefully considered opinion of Justice LUPIANO that section 598 of the Judiciary Law does have a rational basis, and accordingly does withstand the constitutional challenge raised by the defendants.

I do not agree, however, that a hearing is warranted on the methods used to impanel the Grand Jury which in 1972 returned the indictments before us. There is no support in the record for the statements attributed to the County Clerk of Bronx County that "it was the custom and practice in Bronx County systematically and intentionally to mail qualification notices to prospective jurors based upon a fixed mathematical formula which specifically discriminated against women in that a substantially greater number of such qualification notices were sent to men than to women with the result that substantially more men than women were qualified for service".

In fact, when this claim was first recited in the Bronx County Supreme Court, Trial Term characterized it as "tenuous and unsubstantiated," and based upon "hearsay," and found it "not to be the fact." (*People v Echavarry,* 79 Misc 2d 509, 511.)

Although as Justice LUPIANO observes, it appears that on a motion for reargument that the District Attorney of Bronx County "stipulated" that "the County Clerk in Bronx County engaged in the same administrative practice at the time of our indictments as that followed in New York County at the time of the *Feinstein* indictment, to wit, summoning fewer women than men for jury qualification" that stipulation by its terms cannot be equated with a practice of "systematic exclusion and discrimination" sufficient to make a factual showing that the Grand Jury herein was constituted illegally.

In the absence of a constitutional claim which may in some instance survive a plea of guilty (*Menna v New York,* 423 US 61), the right to appeal following a guilty plea is governed by statute (see, for example, CPL, 710.70, subd 2; CPL 450.30). We should not extend ourselves to decide constitutional issues unless the record contains persuasive evidence which would mandate judicial inquiry.

To reach out for remote issues of constitutional law on the basis of mere allegation not only prevents the termination of a criminal action, but permits the beginning of a new appellate process (see *People v Giuliano,* —— AD2d ——, NYLJ, May 20, 1976, p 7, col 1). After all, a plea of guilty, ordinarily, is designed to prevent regenerated litigation.

For the foregoing reasons, the judgment below should be affirmed.

MARKEWICH and CAPOZZOLI, JJ. (concurring). We concur in the separate opinion of Justice BIRNS and, therefore, in the result, except insofar as it holds that defendant-appellants did not, by their pleas of guilty, waive any infirmity in the procedures theretofore had. The minutes of the plea contain no indication whatever that any so-called reservation of the right to appeal was made; the plea was unconditional.

LUPIANO, J. (concurring in part and dissenting in part). On June 7, 1971, a job action involving certain municipal employees occurred in the City of New York. Defendants, members of Local 237 of the International Brotherhood of Teamsters, a striking union, were employed by the City of New York as bridge tenders. Each was responsible for the opening and closing of a particular drawbridge in Bronx County, which bridges are links in major arteries for vehicular traffic and span a navigable body of water. In furtherance of a plan conceived by the union to maximize disruption during the strike, each defendant on the day set forth above, opened his bridge, removed certain electrical equipment so that the bridge could not be closed and left his post. The predictable chaotic effect on vehicular traffic resulted.

Subsequently, defendants were indicted by the Bronx County Grand Jury, which indictments contained three counts charging that defendants' actions as outlined above constituted criminal tampering (a class D felony under Penal Law, § 145.20), obstruction of governmental administration (a class A misdemeanor under Penal Law, § 195.05) and official misconduct (a class A misdemeanor under Penal Law, § 195.00).[1] Pertinent to our inquiry is the fact that during subsequent judicial proceedings, de-

[1] Though not material here, it should be noted that the third count of official misconduct of each indictment was later suspended to correct pleading defects.

fendants challenged the validity of the indictments upon the ground that the indicting Grand Jury was unconstitutionally constituted and, hence, abridged defendants' due process and equal protection guarantees under the Fourteenth Amendment to the Constitution of the United States and sections 6 and 11 of article I of the Constitution of the State of New York. The prime thrust of this challenge was based on the alleged unconstitutionality of section 598 of the Judiciary Law and the purported exclusionary practice involving the systematic and intentional mailing of qualification notices to prospective jurors in Bronx County based on a fixed formula which specifically discriminated on sexual grounds in that a substantially greater number of such qualification notices were deliberately sent to men than to women, with the result that substantially more men than women were qualified for service. This challenge was rejected by Trial Term (*People v Echavarry*, 79 Misc 2d 509). Defendants then sought to effectuate this challenge by way of an article 78 writ of prohibition. The People moved to dismiss on the ground of prematurity, to wit, that the constitutional issues presented were not ripe for review until after entry of judgment. The application was denied and defendants' petition dismissed by this court (*Matter of Siciliano v Justices of Supreme Court*, 46 AD2d 858). The Court of Appeals denied leave to appeal from our determination on the ground that the remedy sought was unavailable, citing *Matter of Roberts v County Ct. of Wyoming County*, (34 NY2d 246) which holds that prohibition does not ordinarily lie if there is an adequate remedy by way of appeal from a judgment (*Matter of Siciliano v Justices of Supreme Court*, 35 NY2d 990). Thereafter, Trial Term permitted renewal of defendants' motion challenging the indictments and upon such renewal, the court adhered to its prior determination. At this

juncture, defendants on the advice of counsel apparently agreed that the proceedings would be resolved at the trial level by the entry of guilty pleas solely to misdemeanor charges, with defendants' constitutional challenges being purportedly preserved and thus ripened for appellate review.

At the outset we must consider the defendants' contention that the indictments are invalid in that the underlying wrong was not actionable under the Federal supremacy doctrine. Section 499 of title 33 of the United States Code provides, in pertinent part: "It shall be the duty of all persons owning, operating, and tending the drawbridges * * * built across the navigable rivers and other waters of the United States, *to open, or cause to be opened,* the draws of such bridges under such rules and regulations as in the opinion of the Secretary of Transportation the public interests require to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law. Every such person who shall willfully fail or refuse *to open, or cause to be opened,* the draw of any such bridge for the passage of a boat or boats * * * shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $2,000 nor less than $1,000, or by imprisonment (in the case of a natural person) for not exceeding one year, or both such fine and imprisonment, in the discretion of the court" (emphasis supplied).

Defendants concededly walked off their job after first opening the three bridges. As they intended to leave their posts for the day, with the consequence that the bridges would be unattended by them in dereliction of their duty, the bridges unopened would of necessity obstruct water traffic. Thus, defendants take solace in the above statute, contending that the opening of the bridges by them was mandated by Federal law. This simple act, namely, the

opening of the bridge, taken out of context serves as the basis for the defendants' convoluted rationale that the State and municipal jurisdiction has been pre-empted by Federal jurisdiction. Essentially defendants argue that though their action was disruptive of surface traffic, the Congress constitutionally determined the priority of unobstructed watercraft passage and its judgment must prevail under the Supremacy Clause (US Const, art VI, cl 2). Thus they conclude that the State penal statutes here invoked to punish their action must give way under the supremacy doctrine. Viewing the circumstances of defendants' conduct on a pragmatic basis, the opening of the bridges was only part of a series of acts which only incidentally resulted in the *avoidance* of a violation of Federal law. The purpose of a bridge, relevant to this analysis, is to afford convenient passage over a river and a drawbridge over a navigable river fulfills two functions, namely, to afford such passage over the river, but *also* to enable watercraft to navigate freely on the waterway, that is, to pass unobstructed by the bridge. Clearly, then, Congress is concerned solely with the latter function of a drawbridge. To illustrate the obvious, a drawbridge fixed permanently in an open position ceases to be a bridge.

Section 499 of title 33 of the United States Code by its terms recognizes the purposes of a drawbridge and places responsibility upon those operating such facilities. The State Penal Law section which defendants have been convicted of violating is not in conflict with the Federal statute. Patently, the Federal statute seeks to proscribe the willful failure, refusal or neglect to open draws of bridges across navigable waters, while the State penal statutes proscribe tampering with bridges with intent to cause a substantial interruption and impairment of services rendered to the public and effecting that result. Federal law will not displace a State's exercise of police power, unless

there is a clear and manifest purpose by Congress, where otherwise proper, to do so. In the Federal statute at issue there is no explicit statement of congressional intent to pre-empt State power to regulate drawbridges over navigable waters. In the absence of such specific statement, the statutory rule is that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained" (*Florida Avocado Growers v Paul,* 373 US 132, 142). Applying this rule to the instant matter, we view the defendants' argument that the State and city are pre-empted from enacting reasonable regulations consonant with the direction to open the draws of drawbridges and, at the same time, to insure proper operation to serve the public in utilizing the bridge for passage over the waterway, as specious. The statutes at issue herein, both Federal and State coexist for necessary purpose. There is no conflict.

Before considering the defendants' claims that the Grand Jury which indicted them was unconstitutionally selected, it is necessary to resolve the issue whether their voluntary pleas of guilty to the crime of obstructing governmental administration, entered on the advice of competent counsel, foreclose such inquiry. Study of the record discloses that at sentencing, defense counsel pointed out that the constitutionality of the indicting Grand Jury had been challenged by timely motions *prior* to the guilty pleas, that defendants, pursuant to an understanding between the parties, "reserved [their] rights with respect to" such challenges and that defendants intended to appeal and thus resolve the "intriguing questions" posed by such constitutional issue. Examination of the pleading minutes (not made part of the record herein) discloses no express reservation by the defendants of their claim that the indicting Grand Jury was unconstitutionally selected. However, the exhaustive effort by defendants prior to their guilty pleas to secure review of their claim that the Grand Jury which indicted them was unconstitutionally selected, viewed against the statements by defense counsel outlined above, negates the People's argument that the entry of the guilty pleas effected as a necessary consequence, a waiver of such claim.[2] Defendants persuasively urge that as they never disputed the fact that they opened the bridges, their determination to plead guilty was motivated by a desire to avoid burdening (by a needless trial) the State, while at the same time preserving appellate rights.[3] Obviously,

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[2] Reading of the sentencing minutes further discloses that defense counsel addressed the fact that in *People v Feinstein,* (Indictment No. 858-1072) where the president of the Bridgetenders Union was similarly indicted and the same constitutional challenge to the Grand Jury selection process raised, the indictment was dismissed in the Supreme Court, New York County. Alluding to the divergence of result between the New York County disposition and the Bronx County disposition, counsel declared: "We have an unusual situation in which the president of a union has met one fate, namely, his indictment was dismissed, and those that were in the union, who were members • • • [I]t would be inappropriate • • • for these gentlemen to meet a fate so starkly contrasted to what has happened in New York County." Counsel also declared that his observation was to illustrate the propriety of "preservation of rights" of the three defendants.

[3] In their reply brief, defendants-appellants aver that initially these proceedings in Bronx County were co-ordinated with the New York County proceedings in *People v Feinstein.* They state that "[t]he pleas herein were entered at a time when it appeared likely that the companion New York County indictment in *Feinstein* would be dismissed • • • based on the same sex discrimination challenge which is at issue herein • • • [Trial Term in Bronx County] had denied dismissal of the Bronx cases • • • *before* the New York County decision was handed down. Hence, in or about September, 1975, it was agreed that • • • the Bronx cases would be the subject of a plea coupled with a reservation and that the Bronx cases would be held in abeyance for all purposes (including sen-

(footnote continued on following page)

defendants at the time of sentencing were aware of the dismissal of a similar indictment against their union's president predicated on the same "job action" which dismissal had its inception in the constitutional challenge to the indicting Grand Jury.[4] The *nature* of the constitutional challenge urged by the defendants is such that even in the absence of any express reservation of same at the time of entering the guilty pleas, the constitutional vio-

(footnote continued from preceding page)

tencing) until the New York County decision was rendered and a determination then was made in New York County as to reindictment, discharge and the like. Only when the New York County proceedings were finally laid to rest in or about February 1976, were the Bronx trial court preeedings then concluded and the record made as noted above and in accordance with the formula employed (by the same counsel) in *People v Squitieri*, 49 A.D.2d 374 (1st Dept., 1975)"

[4] In *People v Feinstein*, Trial Term in New York County entertained a motion by defendant Feinstein to dismiss the indictment. The court refused to dismiss in the furtherance of justice, but on the challenge to the constitutionality of the Grand Jury which indicted Feinstein, observed: "Defendant's final point is that regardless of the statutory scheme, women were, in fact, excluded from the grand jury which indicted the defendant by the actions of the County Clerk, Norman Goodman, who sent out more qualification notices for jury (and ultimately grand jury) service to men than women. An affidavit admitting and explaining such procedures has been submitted to the court by Mr. Goodman. The District Attorney, in his papers, concedes that such procedure may well be improper and to avoid an additional appellate issue in this case has consented to a dismissal of the indictment and requests leave to resubmit these charges to another grand jury • • • Therefore, in view of the District Attorney's consent to dismiss and since it is not the evidence presented to the grand jury, but rather the apparently defective procedures in summoning that body, which is the basis of the dismissal, this court feels that the interests of justice would require it to exercise its discretion in fault of the District Attorney's application to resubmit and authorizes the People to resubmit these charges to another grand jury within sixty days. If such resubmission is not made within such time, the motion to dismiss is final" (*People v Feinstein*, NYLJ, Nov. 18, 1975, p 6, col 6 [Sup Ct, NY County]).

lations complained of were not rendered irrelevant or "waived". It is beyond cavil that such challenge was *timely* raised *prior* to the entry of the guilty pleas. To frustrate defendants' persistent efforts to secure appellate review of these constitutional issues especially in the unique circumstances presented, by resort to supertechnical analysis, would not serve the interest of justice.

Tollett v Henderson (411 US 258), which is urged in support of the contention that defendants' guilty plea precludes appellate review of the constitutional issues advanced by them, upon close study, warrants the conclusion that defendants are entitled to such review at this point. In that case a defendant indicted for first degree murder in Tennessee pleaded guilty on the advice of counsel and was sentenced to a term of 99 years in prison. Some 25 years later, he urged by way of habeas corpus proceedings that he was deprived of his constitutional right because Negroes had been excluded from the Grand Jury which indicted him. The highest State appellate court ruled he waived his claim by his failure to raise it before pleading to the indictment and by pleading guilty. The Federal District Court and Court of Appeals focused on the issue of waiver and held there was no waiver because there was no relinquishment of a *known* right, that is, defendant was unaware of the constitutional defect at the time of pleading. The United States Supreme Court in granting certiorari framed the issue on a narrow basis: "whether a state prisoner, pleading guilty *with the advice of counsel,* may later obtain release through federal habeas corpus by proving *only* that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury" (*Tollett v Henderson, supra,* p 260; emphasis supplied). Of critical import was the court's observations that defense counsel's "major effort appears to have been to arrange a form of plea

bargaining, whereby [defendant] would plead guilty to the murder charge" and that defendant's assertion of systematic exclusion of Negroes "was made *for the first time* many years *after* he had pleaded guilty to the offense for which he was indicted by the grand jury" (*Tollett v Henderson, supra,* pp. 261-262; emphasis supplied). Thus, the court proceeded to focus on the adequacy of legal representation, declaring: "Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law * * *. In order to obtain his release on federal habeas under these circumstances, [defendant] must not only establish the unconstitutional discrimination in selection of grand jurors, he must *also* establish that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the 'range of competence demanded of attorneys in criminal cases'" (*Tollett v Henderson, supra,* p 268; emphasis supplied). In light of the *pre-plea* constitutional challenges in the instant matter and the necessary relevance of such challenge to defense counsels' advice and representation of their client's interests, it is quite clear that the *Tollett* rationale is supportive of defendants' contention that the constitutional issues are now ripe and have been preserved for appellate review. A contrary conclusion would exalt form over substance and constitute a myopic view of the relevant circumstances.

People v Chirieleison (3 NY2d 170) further supports our determination that defendants have not waived their constitutional challenge by pleading guilty. In that case, the defendant's motion to dismiss the indictment on the ground that he had been denied his right to a speedy trial was denied and his appeal from such order of denial was dismissed by the Appellate Division on the basis that the

order was intermediate in nature and not appealable. Subsequently, defendant pleaded guilty and on appeal from the judgment of conviction brought up for review the order denying his motion to dismiss. The People argued that the guilty plea effected a waiver of this claim. Judge FULD (later Chief Judge) declared for the unanimous court (pp 173-174): "When that appeal was dismissed upon grounds of nonfinality, the defendant could, of course, have stood trial—and, if he had, the district attorney recognizes, the 'defense' of waiver could not have been interposed and the defendant would have been in a position (had he been convicted) to obtain a reversal of the order denying his motion to dismiss. The plea was, of course, a voluntary one, but, in the light of all the circumstances, it may not be said that defendant's conduct spelled out a waiver. We cannot agree that acceptance of the plea to a misdemeanor was 'an expression of happy relief on [defendant's] part at being able to avoid even the chance of conviction for the greater crime' or that the defendant received 'a *quid pro quo* which satisfied him.' On the contrary, defense counsel may well have reasoned, as his subsequent action indicated, that the defendant, by pleading guilty, was accorded an opportunity of having the appellate courts pass upon the motion to dismiss, without subjecting him to the risk of the heavy sentence that might have followed a trial and a conviction for first degree robbery."

In *Menna v New York* (423 US 61), the United States Supreme Court held that a defendant's double jeopardy claim is not barred by a guilty plea. In footnote 2 to its *Per Curiam,* the court stated: "Neither *Tollett v Henderson,* 411 U.S. 258 (1973), nor our earlier cases on which it relied, *e.g., Brady v United States,* 397 U.S. 742, and *McMann v Richardson,* 397 U.S. 759 (1970), stand for the proposition that counseled guilty pleas inevitably 'waive'

all antecedent constitutional violations • • • [I]n *Tollett*, we emphasized that waiver was not the basic ingredient of this line of cases, 411 U.S., at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." The constitutional challenge to the indicting Grand Jury is properly before us for review and will now be considered.

In each of these appeals it is averred that section 598 of the Judiciary Law is unconstitutional insofar as it provides that "[n]o public officer or employee of the United States government, or of any state, city, or municipality, or of any political subdivision of any of them, or of any official board, authority, council, commission, corporation, or other agency of any of them, receiving annual compensation in excess of one thousand dollars from the aforesaid sources, shall serve on any grand jury." It is initially noted that public employees are excused from Grand Jury service *only* and not from petit jury service.[5] "Under traditional equal protection [14th Amdt.] principles, a State retains broad discretion to classify as long as its classification has a reasonable basis" (*Graham v Richardson*, 403 US 365, 371). Classifications based on sex,[6]

[5] Further, in respect of Grand Jury service not all public employees are excluded. Only those receiving compensation in excess of $1,000 are excluded.

[6] *Frontiero v Richardson*, 411 US 677.

nationality,[7] alienage,[8] and race[9] are *inherently suspect* and subject to close judicial scrutiny. It has also been noted that the equal protection clause requires that a statutory classification bear some rational relationship to a legitimate State purpose and that "when state statutory classifications approach sensitive and fundamental personal rights, [the] Court exercises a stricter scrutiny" (*Weber v Aetna Cas. & Sur. Co.*, 406 US 164, 172). The inquiry, therefore, must focus on what legitimate State interest is sought to be promoted by the classification and what fundamental personal right might be endangered by the classification. The classification embodied in section 598 of the Judiciary Law is not inherently suspect. CPL 190.05 provides, in part, that the functions of a Grand Jury are "to hear and examine evidence concerning offenses *and concerning misconduct, nonfeasance and neglect in public office*, whether criminal or otherwise, and to take action with respect to such evidence as provided in section 190.60" (emphasis supplied). The specific direction to make inquiry into "misconduct, nonfeasance and neglect in public office", one of the principal functions of the Grand Jury is quite relevant to consideration of whether section 598 of the Judiciary Law is subject to constitutional infirmity as urged by appellants.

The basic duty of a Grand Jury is to accuse or to exonerate in a proper case, and a Grand Jury proceeding is an *investigation* rather than a prosecution. As aptly observed in *United States v Calandra* (414 US 338, 349): "Because the grand jury does not finally adjudicate guilt

[7] See *Oyama v California*, 332 US 633, 644-646.

[8] *United States v Carolene Prods. Co.*, 304 US 144, 152-153, n 4; *Takahashi v Fish & Game Comm.*, 334 US 410, 420; *Graham v Richardson*, 403 US 365.

[9] *McLaughlin v Florida*, 379 US 184, 191-192; *Loving v Virginia*, 388 US 1, 9.

or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial". A petit jury as distinct from a Grand Jury, has a defined narrowed function, to wit, the determination of facts and, in the criminal area, the concluding of the issue of the guilt or innocence of a defendant. *Taylor v Louisiana* (419 US 522) and *United States v Wood* (299 US 123), clearly demonstrate that the composition of a petit jury must be representative of a cross section of the community. However, public employees may serve on a petit jury in this State and there is no Sixth Amendment violation of an impartial jury trial therefore emanating from section 598 of the Judiciary Law.

Study of the legislative background of section 598 of the Judiciary Law discloses that the paragraph under attack herein was "recommended by the Grand Jury Association of New York County, on the ground that, although it is the practice not to place such persons on grand juries, specific provision to that effect should be included in the law because of the quasi-judicial, quasi-prosecutioning character of the grand juries *when investigating official corruption*" (Sixth Annual Report of NY Judicial Council, 1940, p 208; emphasis supplied). This brief legislative history viewed in conjunction with the functions of a Grand Jury as set forth above, warrants the conclusion that the classification embodied in the subject paragraph has a rational basis. It is well recognized that a statute is presumed valid and constitutional and the one challenging the statute has the burden of demonstrating the contrary beyond a reasonable doubt (see McKinney's Cons Laws of NY, Book 1, Statutes, § 150, subd b). Consequently, appellants carry the heavy burden of showing the statute insofar as they object to it to be wholly without rational basis.

It is patent that the paragraph at issue is subject to a "rational basis" test and not a "strict scrutiny" test. The rationale delineated in *United States v Calandra* (*supra*) lends inferential support to this view. Indeed, in *United States v Wood* (*supra*) a defendant who was convicted of petit larceny, attacked a congressional statute which had removed the exemption of certain public service employees, thereby permitting members of this classification to sit as members of the petit jury. The intermediate Federal appellate court held that the statute violated the defendant's Sixth Amendment right to trial by an impartial jury. The United States Supreme Court granted certiorari and Chief Justice HUGHES writing for the majority observed, relevant to the issue of presumed bias on the part of public employees because of the nature of their employment, that such bias "rests on an assumption without any *rational foundation*" (*United States v Wood, supra,* p 149; emphasis supplied). The fact that public service employees may serve on petit juries and in certain instances on Grand Juries in this State, negates any suggestion that section 598 of the Judiciary Law rests on an assumption of bias inhering in public service employees merely by nature of their employment.

It is also noted that in *Matter of Alessi v Nadjari* (47 AD2d 189), we were concerned with a claim that the exclusion of women from the pool of jurors, that is, from both petit jury and Grand Jury service, under *Taylor v Louisiana* (419 US 522, *supra*) mandated quashing a subpoena on the ground that the Grand Jury was unconstitutionally impanelled. We held that there was no practical difference to the claim that *Taylor* applied to a petit jury in view of the nature of the defect in the impaneling process. Here, however, public employees, we reiterate, are not excluded from service on a petit jury and, therefore, a practical distinction is present.

Accordingly, in light of the presumption of constitutionality and the grave burden placed on those who would overturn the statute, which burden has not been carried, and cognizant that the Criminal Procedure Law specifically mentions misconduct in public office for Grand Jury action, and viewing the classification embraced in section 598 of the Judiciary Law as having a rational basis, we conclude that said statute is constitutional.

In addition, defendants challenge the indicting Grand Jury on the ground that at and prior to the time of such jury's selection, it was the custom and practice in Bronx County to systematically and intentionally mail qualification notices to prospective jurors, based upon a fixed mathematical formula which specifically discriminated against women in that a substantially greater number of such qualification notices were sent to men than to women, with the result that substantially more men than women were qualified for service. Section 13 of the Civil Rights Law states in pertinent part: "No citizen of the state possessing all other qualifications which are or may be required or prescribed by law, shall be disqualified to serve as a grand or petit juror in any court of this state on account of race, creed, color, national origin or *sex*" (emphasis supplied). Thus, since 1937, New York has statutorily barred sex discrimination in jury selection. On defendants' original motion to dismiss the indictment, Trial Term in respect of this issue, declared: "Parenthetically, counsel in a supplementary affirmation citing the court's action in *People v Attica Bros.* (79 Misc 2d 492) makes so tenuous and unsubstantiated an allusion to the exclusion of women from juries in Bronx County that it is doubtful if he intended it, based upon hearsay as it is, to be at issue in the instant matter. From the court's personal involvement and knowledge of the selection of Grand Juries in Bronx County, we find this contention not to be the fact" (*People v Echavarry*, 79 Misc 2d 509,

511). On defendants' subsequent motion to reargue, Trial Term again rebuffed their challenge based on the practice in Bronx County set forth above, focusing its attention not on the issue raised by such practice, but on the statutory exemption of women which formerly obtained pursuant to section 599 of the Judiciary Law.[10] On the reargument, defense counsel declared that he was authorized by the County Clerk of Bronx County to represent that at and prior to the time of the selection and constitution of the Grand Jury which indicted defendants, the practice complained of by defendants was engaged in "systematically and intentionally" and that the essential facts were verified by the People. A hearing was requested, if necessary, pursuant to CPL 210.45 (subd 6) or in the interest of justice. The People in opposition "stipulated" that the Bronx County Clerk engaged in the same administrative practice at the time of the defendants' indictments as that followed in New York County at the time of the *Feinstein* indictment (*People v Feinstein* involved a similar indictment, ultimately dismissed, against the president of the union of which defendants are members). However, the People contended that although the practice was engaged in, it did not constitute illegal "systematic exclusion" and "discrimination" so as to compel the conclusion that the indicting Grand Jury was "illegally constituted". Patently, defendants made a sufficient showing to warrant a hearing on this issue.

In *Taylor v Louisiana* (419 US 522, *supra*) the United States Supreme Court viewed the selection of a petit jury

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[10] L 1975, ch 4, § 3, eff Feb. 5, 1975 repealed subdivision 7 of section 599 of the Judiciary Law which permitted a women [sic] to claim exemption. The existence of such claim to exemption may well have been the basis for the alleged discriminatory practice complained of by defendants herein in an endeavor to secure an adequate jury pool. Since such issue is not directly relevant for purposes of disposition herein, we do not treat of same.

from a representative cross section of the community to be an essential component of the Sixth Amendment right to a jury trial in a criminal case.[11] The systematic exclusion of women from jury panels was urged as having a rational basis. Nevertheless, depriving a defendant of the right to a jury drawn from a fair cross section of the community by the prospect of systematically excluding women as a class, "cannot be overcome on merely rational grounds. There must be weightier reasons if a distinctive class representing 53% of the eligible jurors is for all practical purposes to be excluded from jury service • • • [I]t may be burdensome to sort out those who should not be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials" (*Taylor v Louisiana, supra,* pp 534-535). What we are here concerned with is not statutory or constitutional provisions of New York State *excluding* women from jury service, but with an alleged administrative practice whereby a fixed percentage of women was effectively excluded from such service.[12] The claim urged by defendants as to the discriminatory practice engaged in by the County Clerk, was timely raised,

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[11] Prior to trial on a criminal charge of kidnapping, the defendant sought to quash the petit jury venire from which his jury would be selected. Of the persons eligible for jury service, 53% were female, but no more than 10% of the persons on the jury wheel were women. The discrepancy between females eligible for jury service and those actually included in the venire resulted from the operation of Louisiana constitutional and statutory provisions (later repealed) which excluded a woman from jury service selection unless she had previously filed a written declaration of her desire to be subject to jury service.

[12] It has been noted that "when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality" (*Frontiero v Richardson,* 411 US 677, 690).

relates to the systematic *exclusion* of women from jury service at the time of the indictments and partakes of the requisite constitutional dimension to warrant a full hearing.[13]

Trial Term sentenced each defendant on the class A misdemeanor to a $1,000 fine, plus three years' probation, the only term of which enumerated at sentencing was that each defendant be barred from taking any civil service promotional examination or accepting any such promotion during the probationary period. Later that day, the court signed an order for each defendant which bears the legend "Conditions of Probation 410.10 CPL—65.10 PL" and incorporates the oral conditions of probation set forth above and additional probationary conditions which may aptly be described as standard. Defendants claim that the sentences are invalid in that a written copy of the conditions was not presented *at the time* sentence was imposed (CPL 410.10). CPL 410.10 (subd 1) provides in pertinent part that "[w]hen the court pronounces a sentence of probation • • • it *must* specify *as part of the sentence* the conditions to be complied with. Where the sentence is one of probation, the defendant *must* be given a written copy of the conditions *at the time* sentence is imposed" (emphasis supplied). It is clear that the conditions are

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[13] It appears that the opposition by the People was primarily concerned with disputing the legal conclusions to be drawn from the existence of such discriminatory practice. A full factual delineation of such discriminatory practice is not presented by this record. It appears to be acknowledged that such discriminatory practice has been discontinued. In *United States v. Zirpolo* (450 F2d 424, 428-429) a note of caution is sounded: "Whether the exclusion be total, as in *Ballard v* [*United States,* 329 US 187, 195], or only partial, as here, in denying representation to a substantial percentage of women, the ultimate objective of achieving a true cross-section of the community is ill-served. Any deliberate interference—irrespective of purpose—with a random jury selection from a list of all qualified citizens cripples the cross-section ideal".

part of the sentence and must be in writing. Failure to abide by this statutory mandate may not be excused by characterizing the error as "technical". On this basis alone defendants are entitled to have this matter remanded for resentencing. In light of this conclusion, the court does not consider defendants' remaining contention that the sentences imposed are excessive.

However, as noted above, defendants are entitled to a hearing on the issue of whether the Grand Jury which indicted them was impaneled as a consequence of an administrative selection procedure or practice whereby males were favored over females systematically and intentionally to a degree that the defendants were deprived of their Sixth and Fourteenth Amendment rights to a jury drawn from a fair cross section of the community. Accordingly, this matter should be remanded to the trial court for such hearing. Final determination of this appeal of necessity must be held in abeyance pending the result of such hearing.

KUPFERMAN, J. (concurring in part and dissenting in part). While I agree that a plea of guilty can constitute a waiver of fundamental constitutional rights (see *Tollett v Henderson,* 411 US 258, *but see Menna v New York,* 423 US 61 [*Per Curiam*]), it is clear that in these matters there was no intentional waiver. (*People v Chirieleison,* 3 NY2d 170.) In the present situation, it was made perfectly clear that the guilty plea was being taken subject to the right of appeal on several constitutional and statutory points.

With respect to the issues raised, it would seem that there is no rational basis (see *United States v Wood,* 299 US 123), for the legislation (Judiciary Law, § 598) which specifically excludes from service on a Grand Jury *all* public employees *receiving over* $1,000 annual compensation. The effect of this legislation is to exclude from Grand Jury service, among many others, for example, a part time janitor earning $1,100. Inasmuch as foreclosing

jury service by a significant segment of the population (*Taylor v Louisiana,* 419 US 522), renders their action a nullity, we are constrained to reverse and dismiss the indictment.

If we were to reach the point of considering the sentences imposed, they are clearly not excessive, and there was no abuse of discretion with respect to them.

Judgments of conviction affirmed in opinion by BIRNS, J.; MARKEWICH, J. P., and CAPOZZOLI, J., in a separate partially concurring and partially dissenting opinion, concur with BIRNS, J., as to affirmance, as to constitutionality of section 598 of Judiciary Law and as to absence of a sufficient record to present for appellate review question of existence of a constitutionally discriminatory practice excluding women from service on Grand Juries, but dissent insofar as to hold that defendants-appellants' pleas of guilty constitute a waiver of any prior infirmities in the procedures theretofore had; LUPIANO, J., in a separate partially concurring and partially dissenting opinion, concurs with BIRNS, J., that defendants-appellants by their pleas of guilty did not waive constitutional challenge to indicting Grand Jury and as to constitutionality of section 598 of Judiciary Law, but dissents in part, holding that the question of existence of discriminatory practices excluding women from Grand Juries should be remanded for hearing, and also that there should be remand of defendants-appellants for resentence in respect of conditions of probation; KUPFERMAN, J., in a separate partially concurring and partially dissenting opinion, concurs with BIRNS, J., that defendants-appellants' pleas of guilty did not constitute a waiver of prior infirmities, but dissents to hold section 598 of Judiciary Law unconstitutional, requiring reversal of convictions and dismissal of indictments.

Three judgments, Supreme Court, Bronx County, each rendered February 27, 1976, affirmed.

Appendix E, Order of Supreme Court.

SUPREME COURT
OF THE
STATE OF NEW YORK

PART XXIV COUNTY BRONX

Indictment Number 2865 1971

Motion for: .....

.....

Submitted ..... 19....

Argued ..... 19....

Present: Hon. HERBERT B. EVANS, J.S.C.

THE PEOPLE OF THE STATE OF NEW YORK

against

DANIEL SICILIANO

Defendant

	Papers Numbered
Notice of Motion and Affidavit Annexed	
Order to Show Cause and Affidavits Annexed ..	
Answering Affidavits	
Replying Affidavits	
Exhibits	
Stenographer's Minutes	
Stipulation	

Appendix E, Order of the Supreme Court.

Upon the foregoing papers this motion is decided in accordance with memorandum opinion simultaneously filed herewith.

☐ Granted;

☒ Denied;

☐ Denied for failure to comply with the provisions of the omnibus motion rule promulgated by the Administrative Board of the Judicial Conference of the State of New York as set forth in 22NYCRR 31.5;

For the following reasons:

Opinion filed,

H.B.E.
J.S.C.

Defendant .....

Dated October 3, 1974

Briefs: People .....

Appendix E, Opinion of Supreme Court.

SUPREME COURT : BRONX COUNTY
TRIAL TERM : PART XXIV

Ind. No. 2865/1971

THE PEOPLE OF THE STATE OF NEW YORK

—against—

DANIEL SICILIANO

Defendant.

HERBERT B. EVANS, J.:

This is a motion by defendant Siciliano for an order pursuant to CPL 210.20(1)[a] and [c], 210.25(2) and 210.35(1) dismissing the indictment issued against the defendant on the grounds that the grand jury which issued it was improperly constituted, and for an order pursuant to CPL 210.20(4) directing that if the People resubmit the charges, that such resubmission be to a new grand jury empanelled without regard for Section 598 of the Judiciary Law.

The defendant Siciliano is a bridge tender who was indicted on July 27, 1971 under Penal Law Section 145.20 for his actions in opening a drawbridge within Bronx County during a labor action on June 7, 1971.

Defendant argues that Section 598 of the Judiciary Law is constitutionally offensive. That sections reads, insofar as applicable, as follows: "Each of the following officers is disqualified to serve as a juror: • • • No public officer or employee of the United States Government, or of any state, city or municipality, or of any political subdivision of any of them, or of any official board, authority, counsel,

commission, corporation, or other agency of any of them, receiving annual compensation in excess of one thousand dollars from the aforesaid sources, shall serve on any grand jury."

Historically, the grand jury came down to us as part of the common law, its object was to secure to the subject the right to appeal to his peers under the immunity of secrecy before having to stand trial, and arose out of the conflict between the rights of the subject and the power of the state. United States v. Olmstead, 7 F 2d 756, made clear its status and function: "It is a distinct, independent body, and must act from influence, fear, favor, affection, reward, or hope • • • the Constitution of the United States, as well as the constitution of all the states, show it is adopted as a means of protection to the citizens as well as a necessary aid to public justice."

The section of the Judiciary Law which petitioner seeks to attack was enacted in 1940 based upon the recommendation of the Judicial Council. The Council's recommendations were a product of several years of deliberation and study as reflected in the Sixth Annual Report of the Judicial Council. The Council's comments to the then proposed Section 598 states its purpose as follows: "The last paragraph was recommended by the Grand Jury Association of New York County, on the ground that, although it is the practice not to place such persons on grand juries, specific provision to that effect should be included in the law because of the quasi judicial, quasi prosecuting character of the grand juries when investigating official corruption."

Defendant's counsel's memorandum in support of his motion contends that: (1) The exclusions of Section 598 are without rational foundation; (2) That the presumption of bias created by Section 598 violates due process; and (3) That the indictment by a jury which excludes a sizeable

segment of the community violates the 14th Amendment right to an "impartial jury" drawn from a "cross-section of the community". Parenthetically, counsel in a supplementary affirmation citing the court's action in People v. Attica Brothers, makes so tenuous and unsubstantiated an allusion to the exclusion of women from juries in Bronx County that it is doubtful if he intended it, based upon hearsay as it is, to be at issue in the instant matter. From the court's personal involvement and knowledge of the selection of grand juries in Bronx County, we find this contention not to be the fact.

In matters involving a challenge for constitutionality, to the party raising such question falls the onus of proving the same. As was said in Fenster v. Leary, 20 N Y 2d 314, "• • • it must be observed that a strong presumption of validity attaches to statutes and that the burden of proving invalidity is upon those who challenge their constitutionality to establish this beyond a reasonable doubt."

Defendant contends that the exclusion of Section 598 is without rational basis. What then is the test of reasonableness? Clearly we cannot ignore as arbitrary the efforts and study of the Judicial Council nor those of the Grand Jury Association. Their efforts were devoted to the satisfaction of a compelling state interest; no other motive is apparent or can be inferred. Epton v. Nenna, 318 F. Supp. 899, touches upon the limitation in question by stating that the New York Judiciary Law Section 598, disqualifies for jury service not only broad categories of elected and appointed officials in high office, but any state or federal employee, receiving annual compensation in excess of one thousand dollars, and continues "Whether or not this is wise or essential rational people could surely entertain the broad underlying premise that those dependent upon government for substantial income might be unsuitably conflicted if they served as jurors". And at

page 903, "This court need not applaud the wisdom of this exclusion to sustain its constitutionality". The court held in Van Berkel v. Power, 16 N Y 2d 37, in commenting on the validity of legislative enactment, "This presumption is accompanied by another as to the statute: that the Legislature has investigated and found the existence of a situation showing or indicating the need for or desirability of the legislation." To succeed as to reasonableness, the defendant must prove that the Legislature did not investigate and find a situation calling out for the type of limitation enacted.

Defendant raises the question of bias implied by exclusion. The exclusion of government employees does not constitute an irrebutable presumption that these employees are biased once we establish a rational basis for the statute. The disqualification is no more presumptive of bias than the exclusion of the other officers mentioned, who certainly have the same capacity for independent judgment as the employees excluded. Historically as the jury selection process developed here it became necessary for a variety of reasons, to exclude certain groups. The test here would be whether a rational basis had been established and whether the exclusion was applied evenly to all those similarly circumstanced. Defendant relies upon Dunn v. Blumstein, 405 U. S. 330, in support of his thesis that the presumption of constitutionality of a statute must give way when challenged and the burden of proof shouldered by the state as to a compelling state interest. However, a complete reading of the opinion has the court stating, "But if it was not clear then, it is certainly clear now that a more exacting test is required for any statute that 'places a condition on the exercise of the right to vote' ". Hardly a case on all fours with the one that confronts us now.

Lastly, defendant urges that the exclusion complained of deprives him of an "impartial jury" drawn from a

"cross-section of the community" is the type of constitutional infirmity sufficient to abridge his rights under the 14th amendment. At first blush it would appear to fly in the face of judicial convention to suggest that a grand jury need not be impartial, however, respondent's memo suggests exactly that and directs our attention to the rather positive language contained in Gorin v. United States, 313 F 2d when at page 645, the appellant presupposed a constitutional right to be indicted by a grand jury free of government instigated prejudice and the court said: "They must also 'presuppose' that they do not need to show that in fact the grand jury which indicted them did not perform its sworn duty to act with impartiality but instead was actuated by government inspired bias and prejudice. We are not prepared to grant these 'presuppositions'. So far as we are aware, none has the sanction of any decision of the Supreme Court of the United States and all have been rejected in one or another carefully considered opinion of a lower federal court." (Citations omitted).

Peters v. Kiff, Warden, 407 U. S. 493, relied upon by movant to show exclusion of a class, involved systematic and arbitrary exclusion of a whole race of people. Justice Marshall wrote "* * * a state cannot, consistent with due process subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States." The test would seem to be, according to the learned Justice, whether or not the exclusion was arbitrary and discriminatory.

In Gorin v. United States at page 644, in commenting upon the phrase "cross-section of the community"; "The argument rests upon too literal a reading of the phrase quoted above, for it has never been the law that a jury must represent a true cross-section of the community. (See Report of the Committee on the operation of the Jury

System to the Judicial Conference of the United States, September 1962 at page 6). Certain groups * * * are and time out of mind have been exempted from jury duty, some for the general public interest * * * and others * * * for the effective operation of the jury system".

More recently and in conclusion, Neale v. Hayduk, New York Law Journal, September 12, 1974, in quoting from Matter of Dorn "HH" v. Lawrence "II", 31 N Y 2d 154, "It is fundamental, of course, that the Legislature may classify persons for purposes of legislation without infringement of the equal protection guarantee and that its discretion in this regard is broad and will not be disturbed if any state of facts can reasonably be conceived to sustain its classification * * * or even if the classification be fairly debatable, provided only it shall not be palpably arbitrary (New York ex rel. Bryant v. Zimmerman, 276 U. S. 63)."

Accordingly, this motion is denied.

Dated: October 3, 1974.

H.B.E.
J. S. C.

Appendix E, Order of Supreme Court.

SUPREME COURT
OF THE
STATE OF NEW YORK

PART XXIV COUNTY BRONX

Indictment Number 2866 1971

Motion for: .....

.....

Submitted ..... 19....

Argued ..... 19....

Present: Hon. HERBERT B. EVANS, J.S.C.

THE PEOPLE OF THE STATE OF NEW YORK

against

VICTOR ECHEVARRY, JR.

Defendant

Papers Numbered

Notice of Motion and Affidavit Annexed .....

Order to Show Cause and Affidavits Annexed ..

Answering Affidavits .....

Replying Affidavits .....

Exhibits .....

Stenographer's Minutes .....

Stipulation .....

Appendix E, Order of Supreme Court.

Upon the foregoing papers this motion is decided in accordance with memorandum opinion simultaneously filed herewith.

☐ Granted;

☒ Denied;

☐ Denied for failure to comply with the provisions of the omnibus motion rule promulgated by the Administrative Board of the Judicial Conference of the State of New York as set forth in 22NYCRR 31.5;

For the following reasons:

Opinion filed,

H.B.E.
J.S.C.

Defendant .....

Dated October 3, 1974

Briefs: People .....

Appendix E, Order of Supreme Court.

SUPREME COURT
OF THE
STATE OF NEW YORK

PART XXIV COUNTY BRONX

Indictment Number 2867 1971

Motion for: .....

.....

Submitted ..... 19....

Argued ..... 19....

Present: Hon. HERBERT B. EVANS, J.S.C.

THE PEOPLE OF THE STATE OF NEW YORK

against

DANIEL GIBSON

Defendant

Papers Numbered

Notice of Motion and Affidavit Annexed .....

Order to Show Cause and Affidavits Annexed ..

Answering Affidavits .....

Replying Affidavits .....

Exhibits .....

Stenographer's Minutes .....

Stipulation .....

Appendix E, Order of Supreme Court.

Upon the foregoing papers this motion is decided in accordance with memorandum opinion simultaneously filed herewith.

☐ Granted;

☒ Denied;

☐ Denied for failure to comply with the provisions of the omnibus motion rule promulgated by the Administrative Board of the Judicial Conference of the State of New York as set forth in 22NYCRR 31.5;

For the following reasons:

Opinion filed,

H.B.E.
J.S.C.

Defendant .....

Dated October 3, 1974

Briefs: People .....

Identical opinions to that in *People* v. *Siciliano*, reproduced at *supra*, pp. 44a-49a, were rendered on the same day by the Supreme Court, Bronx County (per Justice Evans) in *People* v. *Echavarry* and *People* v. *Gibson*. To avoid needless duplication and length, those identical opinions have not been reproduced herein.

Appendix E, Order and Decision of Appellate Division.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 3, 1974

Present—Hon. Owen McGivern, Presiding Justice,
Emilio Nunez,
Aron Steuer,
Louis J. Capozzoli, Justices.

1553 [M-2533, M-2584, M-2635, M-2702]

In the Matter of the Application of Daniel Siciliano, Victor Echavarry, Jr., and Daniel Gibson,
Petitioners,

For a Judgment under Article 78 of the CPLR in the nature of a writ of prohibition,

—against—

The Justices of The Supreme Court of the State of New York, First Judicial District, now or hereafter assigned to preside in any of the Parts of the Supreme Court, Bronx County, held for the Trial of Criminal Indictments, Hon. Mario Merola, as District Attorney, Bronx County, and Hon. Leo Levy, as County Clerk, Bronx County,
Respondents.

The above-named petitioners having presented a petition to this Court praying for an order, pursuant to Article 78 of the Civil Practice Law and Rules, in the nature of a writ of prohibition (1) enjoining respondents, other than

the County Clerk of Bronx County, from exercising any jurisdiction over petitioners or permitting any trial of petitioners or other proceedings against any of them in connection with Indictments Nos. 2865/71, 2866/71 and 2867/71, respectively, (2) directing dismissal of said indictments, (3) declaring the final paragraph of Section 598 of the Judiciary Law to be unconstitutional, at least as to regular grand juries, (4) directing, pursuant to Section 592 et seq. of the Judiciary Law, that the qualification, selection and service of all jurors, grand and petit, shall be made on the basis of random selection wholly without any considerations of sex, and (5) for other relief,

And respondent District Attorney, Bronx County, having moved for an order dismissing the petition herein without reaching the merits,

And respondent Justices of the Supreme Court of the State of New York, First Judicial Department, and the District Attorney, Bronx County, having moved for an order dismissing the petition herein upon the grounds that an Article 78 proceeding does not lie herein,

And petitioners having moved for an order staying all further proceedings now pending in the Supreme Court, Bronx County, under Indictments Nos. 2865/71, 2866/71 and 2867/71, pending the hearing and determination of the proceeding herein,

Now, upon reading and filing the notice of application, dated October 23, 1974, with proof of due service thereof, the petition of Daniel Siciliano, Victor Echavarry, Jr., and Daniel Gibson, verified October 10, 1974, and the memorandum of Morris Weissberg, in support of the application; the notice of motion of respondent District Attorney, Bronx County, to dismiss the petition, with proof of due service thereof, and the affidavit and memoranda of Robert M. Moll in support of said motion, and the memorandum of petitioners in opposition thereto, the notice of

motion by the Attorney General of the State of New York on behalf of the respondent Justices of the Supreme Court of the State of New York, First Judicial Department, and District Attorney, Bronx County, to dismiss the petition, with proof of due service thereof, dated November 4, 1974, and the affidavit and memorandum of A. Seth Greenwald in support of said motion, and the memorandum of petitioners in opposition thereto; and the notice of motion of petitioners for an order staying all further proceedings now pending in the Supreme Court, Bronx County, under Indictments Nos. 2865/71, 2866/71 and 2867/71, with proof of due service thereof, and the affidavit of Charles G. Moerdler in support of said motion, and no one appearing in opposition thereto; and after hearing Mr. Morris Weissberg for the application, Messrs. Robert M. Moll and A. Seth Greenwald for the motions to dismiss the petition and Mr. Charles G. Moerdler in opposition thereto and in support of the motion for a stay, and no one appearing in opposition to the motion for a stay; and due deliberation having been had thereon,

It is unanimously ordered that the application for a writ of prohibition and the motion for a stay be and the same hereby are denied and the motions to dismiss the petition granted, without costs and without disbursements. The stay, dated October 30, 1974, affixed to the notice of motion for a stay, is vacated.

ENTER:

JOSEPH J. LUCCHI
Deputy Clerk.

Proceeding No. 2

In the Matter of the Application of

DANIEL SICILIANO, VICTOR ECHVARRY, JR., and DANIEL GIBSON,

Petitioners,

For a Judgment under Article 78 of the CPLR in the nature of a writ of prohibition,

—against—

THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT, now or hereafter assigned to preside in any of the Parts of the Supreme Court, Bronx County, held for the Trial of Criminal Indictments, Hon. MARIO MEROLA, as District Attorney, Bronx County, and Hon. LEO LEVY, as County Clerk, Bronx County,

Respondents.

A motion having been made by John DeLury, as President of and on behalf of the members of the Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters and as Chairman of and on behalf of the New York Conference of Public Employee Organizations, Victor Gotbaum, as Executive Director of and on behalf of the members of District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO, and Ellis F. Van Riper as President of and on behalf of the members of Local 100, Transport Workers Union of America, AFL-CIO, for leave to file a brief amicus curiae in connection with the petitions

presented to this Court by the petitioners in each of the above-entitled proceedings, each seeking a writ of prohibition, pursuant to Article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of John DeLury, Victor Gotbaum and Ellis F. Van Riper in support of said motion, and after hearing Mr. Charles G. Moerdler for the motion, and no one appearing in opposition thereto,

It is ordered that said motion be and the same hereby is denied.

ENTER:

HYMAN W. GAMSO..
Clerk.

Appendix E, Order and Decision of the Court of Appeals.

COURT OF APPEALS
STATE OF NEW YORK

1 Mo. No. 1014

In the Matter of the Application of
Barry Feinstein,
Appellant,

vs.

The Justices of the Supreme Court of the State of New York,
First Judicial District, et al.,
Respondents.

& ano. proceeding—
Mtr. of Siciliano v. Justices.

Motion for leave to appeal and for a stay denied upon the ground that the remedy sought under Article 78 is unavailable (*Matter of Roberts* v. *County Court of Wyoming County*, 34 N Y 2d 246).

Motions to dismiss the appeals taken as of right by petitioners Feinstein and Siciliano et al. granted and the appeals dismissed, without costs, upon the ground that no constitutional question is directly involved.

Appendix E, Order of Supreme Court.

SUPREME COURT
OF THE
STATE OF NEW YORK

PART 203 COUNTY BRONX

THE PEOPLE OF THE STATE OF NEW YORK

against

DANIEL SICILIANO,
VICTOR ECHAVARRY, JR., and
DANIEL GIBSON,
Defendants

Indictment Nos.
2865/1971
2866/1971
Indictment Number 2867/1971

Motion for: Dismissal of Indictment

.....

Submitted ..... 19....

Argued ..... 19....

Present: Hon. HERBERT B. EVANS, J.S.C.

	Papers Numbered
Notice of Motion and Affidavit Annexed	
Order to Show Cause and Affidavits Annexed ..	
Answering Affidavits	

Appendix E, Order of Supreme Court.

Replying Affidavits .....

Exhibits .....

Stenographer's Minutes .....

Upon the foregoing papers this motion is disposed of in accordance with the decision published simultaneously herewith.

Opinion filed,

Dated Jul 28 1975

s/ H.B.E.
J.S.C.

Briefs: People ..... **Defendant** .....

Appendix E, Opinion of Supreme Court.

SUPREME COURT : BRONX COUNTY
TRIAL TERM : PART 203

Indictment Nos.

2865/1971
2866/1971
2867/1971

THE PEOPLE OF THE STATE OF NEW YORK

—against—

DANIEL SICILIANO,
VICTOR ECHAVARRY, JR., and
DANIEL GIBSON,

Defendants.

HERBERT B. EVANS, J.:

The facts here are that the defendants were bridge tenders who were indicted on July 27, 1971 under Penal Law Section 145.20 for their actions in opening drawbridges within Bronx County during a labor action on June 7, 1971.

A prior motion brought on by defendants sought to challenge the validity of indictments accusing the defendants of certain crimes on the grounds that said indictments were constitutionally offensive, violative of due process and without rational foundation. The motion was denied in all respects by this Court on October 3, 1974.

Upon motion to reargue the motion previously denied by this Court, and reargument granted, petitioners move for relief as follows:

(a) A direction pursuant to Criminal Procedure Law Section 210.20(1)(a) and (c), 210.35(a) and 210.35(1), dismissing the indictments on grounds of invalidity and finding that the Grand Jury which issued them was improperly constituted.

(b) A direction pursuant to Criminal Procedure Law Section 210.20(4) that, in the event the People should seek to resubmit any or all of the charges of the indictments, such resubmission shall only be made to a new and properly constituted Grand Jury drawn and impanelled from a representative cross section of the community wholly without regard to the provisions of Section 599(7) of the Judiciary Law and Section 598 of the Judiciary Law and particularly the final paragraph thereof.

Defendants again challenge the validity of Section 598 of the New York State Judiciary Law which exempts certain classes of public employees from service on grand juries, but present no persuasive arguments to counter the reasoning embodied in this Court's decision of October 3, 1974. The Court in that particular decision pointed out that certain groups have always been excluded from jury duty, some for the general public interest and others for the effective operation of the jury system, and to accept the defendant's reasoning might well open the door to segments of the community which time out of mind have been barred from such deliberative role. In reiteration, the test would be not only whether a rational basis had been established but also whether the exclusion was not arbitrary or discriminatory and whether it was applied evenly to all those similarly situated, and the statute here seems to meet the test.

Defendants argue that the Grand Jury that handed down the indictment denied them, as they put it, a "fair cross-sectional jury" because of the statutory exemption of women. Ruling upon a similar motion to dismiss an in-

dictment charging that the juries had been improperly selected, the Court in Gorin v. United States, 313 F. 2d at page 644, stated that it has never been the law that a jury must represent a true cross-section of the community citing page 6 of the 1962 Report of the Committee on the Operation of the Jury System to the Judicial Conference of the United States. Further, the concept of proportional representation of a segment of the community was ruled out in Carter v. Jury Commission of Green County, 396 U.S. at 339. Defendants then have not shown that the exemption complained of has prevented the selection of a Grand Jury consisting of a representative cross-section of the community consistent with the Court's holding in Taylor that "The fair cross-section principle must have much leeway in application. The States remain free to prescribe reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community." (Taylor v. Louisiana, 95 S. Ct. 692.)

It would be well here to distinguish between the New York statute exempting women and the Louisiana statute upon which the Taylor case was based and upon which case the defendants place much reliance in their arguments. Section 599 (7) of the New York State Judiciary Law provides for an absolute right of exemption from jury service for women when and if it should be claimed. Article 402 of the Louisiana Code of Criminal Procedure prohibited women from jury duty unless they applied in writing for permission to serve. The court ruled in Taylor that this amounted to an exclusion. The two statutes must be distinguished and the right of exemption may not be equated with exclusion (see De Kosenko v. Brandt, 63 Misc 2d 895, and People v. Hunn, N.Y.L.J., February 5, 1975, page 17). In addition, since the decision in Taylor, the New York State Legislature has repealed the automatic exemption of women from jury service (Chapter 4 of the Laws of 1975).

Appendix E, Opinion of Supreme Court.

The instant indictments were returned in July of 1971 and Taylor v. Louisiana was decided in January of 1975. The defendants now ask for a retroactive application of Taylor. Even if this court were sympathetic to defendants' argument, it is clear that the relief requested could not be granted. The Appellate Division, First Department, in ruling upon a similar petition, said in Alessi v. Nadjari, N.Y.L.J., March 28, 1975, at page 3, "There might be some validity to the argument of the petitioner were it not for the fact that, approximately one week after the Taylor case was decided, the Supreme Court of the United States decided Daniel v. Louisiana, 95 S. Ct. 704. The court in Daniel denied retroactive applicability of Taylor to cases involving juries 'impanelled prior to the date of that decision' (Daniel v. Louisiana, 95 S. Ct. at p. 705). The Court stated that it would not undermine the reliance of law enforcement officials on prior Supreme Court Decisions in structuring their criminal justice systems, since retroactive application of Taylor would do little to '• • • vindicate the Sixth Amendment interest at stake and would have a substantial inpact on the administration of criminal justice in Louisiana and in other states whose past procedures have not produced jury venires that comport with the requirement enunciated in Taylor.' "

Accordingly, the relief requested on reargument is denied.

Dated: July 28, 1975

J. S. C.

Appendix F, Opinion of Supreme Court.

SUPREME COURT

BRONX COUNTY

TRIAL TERM—PART XXI

THE PEOPLE OF THE STATE OF NEW YORK,

against

DANIEL GIBSON, Indictment No. 2867-1971, VICTOR ECHAVARRY, JR., Indictment No. 2866-1971, DANIEL SICILIANO, Indictment No. 2865-1971.

MASSI, J.:

The motions addressed to the three indictments present common issues and are therefore considered together. Each of the defendants is charged with obstruction of governmental administration, official misconduct and with having criminally tampered with a particular bridge maintained by the City of New York so as to cause a substantial interruption and impairment of service. Except for the name of the defendant and the name of the bridge, the three count indictments are identical. They arose out of a strike by certain municipal employees on June 7, 1971. The defendants, employed by the City as bridge operators, went off their jobs, leaving the bridges in an open position so that traffic over the bridges was halted.

The first count of each indictment charges a violation of section 145.20 of the Penal Law, which reads as follows:

> "A person is guilty of criminal tampering in the first degree when, with intent to cause a substantial interruption or impairment of a service rendered to

the public, and having no right to do so nor any reasonable ground to believe that he has such right, he damages or tampers with property of a gas, electric, sewer, steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality, or district, and thereby causes such substantial interruption or impairment of service.

Criminal tampering in the first degree is a class D felony."

The determinative issue, with respect to the first counts, is whether the bridges were public utilities operated by the City within the purview of the statute. The term "public utility" is not defined in the Penal Law. It is, however, an elastic term which cannot be defined with such precision that one may readily determine whether a given facility falls within it or not.

In People ex rel. City of Pauls v. Williamson (213 P. 2d 852) a bridge and its approaches to afford a continuous route of travel over a creek was held not to be a public utility. Again in Hester v. Louisiana (81 So. 2d 381) a bridge owned and maintained by Warren County, Mississippi, was held not to be a public utility for tax purposes. On the other hand, a bridge was found to be a public utility for rate-making purposes (Clarksburg v. Woodring, 89 F. 2d 788). In Woodmansee v. Kansas City (144 S.W.2d 137) a city market was held not to be a public utility within the Public Service Law, but to be a public utility within the provisions of the City Charter authorizing the issuance of bonds on the credit of income from "public utilities" owned or operated by the City. A cemetery was said to fall within the "public utilities" which the City could purchase (Denton v. City of Sapulpa, 189 P. 532) and in Belton v. Ellis (254 S.W. 1023) a pool and slide was found to be a

public utility within the provisions of a statute authorizing the City to own and operate a "public utility."

Many cases can be cited showing the elasticity of the term, as well as the conflicting interpretations that have been placed upon it (See Words and Phrases, Vol. 35A, pages 85 to 118). The term has been held to include a public park (Derr v. City of Fairview, 247 P. 45), a golf course (Golf View v. Sioux City, 269 N.W. 451), a municipal parking lot (City of Shawnee v. Williamson, 338 P. 2d 355), a library (Bekins v. City of Tulsa, 299 P. 2d 792), and a museum (City of Tulsa v. Williamson, 276 P. 2d 209).

It has been held not to include streets and highways (Coleman v. France, 109 P. 928; Village of Blue Ash v. City of Cincinnati, 182 N.E. 2d 557), garbage removal (Olsen v. City of N.Y., 177 Misc. 99), a school building (Grimes v. Bd. of Ed., 99 P. 2d 876), a municipal auditorium (State v. City of Cleveland, 181 N.E. 24), parking meters (Bd. v. City of Newark v. Local Govt. Bd. of N.J., 45 A. 2d 139), and off-street parking facilities (Park v. Ladd, 323 Mich. 592).

It is clear, therefore, that the meaning to be given the term "public utility" depends on where it is found and the sense in which it is used. Where it appears as part of a statutory provision, it must be given its intended meaning as reflected by the statute. Especially is this so where, as here, we are dealing with a criminal statute, the violation of which would subject a violator to possible incarceration for a term of seven years.

A criminal statute must be unequivocal and must describe the offense with such clarity that all who read it would be made aware of the acts prohibited. The words used must be given their usual and ordinary meaning, and not construed so as to spell out a crime by implication. Unless otherwise clearly indicated, the words must be given a meaning which accords with common usage and under-

standing. A bridge does not come within the common conception of a public utility nor does the statute indicate that it is to be considered as such.

If the clause "public utility operated by a municipality" is considered without regard to the balance of the section, as urged by the district attorney, it may be said to include practically anything maintained by a municipality for the use, benefit, enjoyment or convenience of the public, even though they are not remotely related to the generally accepted understanding of the term. However, that is not the sense in which the term "public utility" is used when consideration is given to the balance of the statute. A fair reading of the section leads to the conclusion, and the court so holds, that the term is used in a restricted sense and limited to services similar to those listed and specified as being owned by corporations, which immediately precedes the clause in question. Because of the nature of the term, any other interpretation would render the undefined provision vague and indefinite, and require speculation as to what might be considered to come within its meaning.

In passing, it is interesting to note that the State Legislature is presently considering an amendment to section 145.20 of the Penal Law, so as to include tampering with "a fire or police alarm system or communication system operated by a municipality" (Senate 2250-A).

The second count of the indictments charge each defendant with having obstructed and impaired governmental administration by the unlawful act of criminal tampering (Sec. 195.05, Penal Law). The word "tamper" is defined as "to meddle especially so as to alter a thing by corruption or adulteration" (Webster's Universal Unabridged Dictionary). It is also defined in the Practice Commentaries to Article 145 of the Penal Law as "interfering with or displacing property" (39 McKinney's, page 386).

The second counts are fully supported by the evidence before the Grand Jury which establishes that the defendants left the bridges in an open position after rendering them inoperable by the removal of part of the electrical equipment. It also appears that two of the defendants had gone to the bridge for this very purpose.

The claim that defendants are being prosecuted for union activity is without substance. They have not been indicted for the exercise of their right to strike, but for the unlawful act of interfering with the proper functioning of the bridges by displacing part of its equipment. The Grand Jury minutes disclose that electrical equipment was removed from the three bridges and that defendants had participated therein.

The third count of the indictments (Official Misconduct) is in the language of the statute (sec. 195, Penal Law) and does not specify the conduct underlying the charge or reveal any facts supporting it. These counts are legally insufficient. They do not comply with section 200.50 CPL which requires each count to contain a plain and concise factual statement clearly apprising defendants of the conduct which is the subject of the accusation. This defect may not be corrected by amendment (sec. 200.70 CPL) nor may the deficiencies be supplied by a bill of particulars (Peo. v. Boganoff, 254 N.Y. 16, 29). The remedy is by way of resubmission (sec. 200.80 CPL).

For the reasons stated, the motions are granted to the extent of dismissing the first and third count of each indictment and otherwise denied.

Dated, April 3, 1972.

VAM
J.S.C.

Appendix F, Order of Supreme Court.

SUPREME COURT

COUNTY OF BRONX

Special and Trial Term Part XXI

Present:

Hon. VINCENT A. MASSI, J. S. C.

File Number 2865 1971

THE PEOPLE OF THE STATE OF NEW YORK

against

DANIEL SICILIANO,

Defendant.

Upon the foregoing papers this motion is disposed of in accordance with disposition on companion motion, indictment number 2865, 1971.

Opinion filed herewith.

Dated April 3 1972

V A M
J. S. C.

FILED
Apr 3 1972
Supreme Court Clerk's Office
Bronx County

Appendix F, Order of Supreme Court.

SUPREME COURT

COUNTY OF BRONX

Special and Trial Term Part XXI

Present:

Hon. VINCENT A. MASSI, J. S. C.

File Number 2866 1971

THE PEOPLE OF THE STATE OF NEW YORK

against

VICTOR ECHAVARRY, JR.,

Defendant.

Upon the foregoing papers this motion is disposed of in accordance with disposition on companion motion, indictment number 2867, 1971.

Opinion filed herewith.

Dated April 3 1972

V A M
J. S. C.

FILED
Apr 3 1972
Supreme Court Clerk's Office
Bronx County

Appendix F, Order of Supreme Court.

SUPREME COURT

COUNTY OF BRONX

Special and Trial Term Part XXI

File Number 2867 1971

Present:
Hon. VINCENT A. MASSI, J. S. C.

THE PEOPLE OF THE STATE OF NEW YORK

against

DANIEL GIBSON,

Defendant.

Motion is disposed of in accordance with memorandu opinion filed simultaneously herewith.
Opinion filed herewith.

Dated April 3 1972

V A M
J. S. C.

FILED
Apr 3 1972
Supreme Court Clerk's Office
Bronx County

Appendix F, Opinion of Appellate Division.

McGIVERN, J.P., NUNEZ, STEUER, TILZER, CAPOZZOLI, J.J.

5990 THE PEOPLE OF THE STATE OF NEW YORK,
Appellant, D. D. Darcy
—against—
DANIEL SICILIANO,
Defendant-Respondent. M. Weissberg

5991 THE PEOPLE OF THE STATE OF NEW YORK,
Appellant, D. D. Darcy
—against—
DANIEL GIBSON,
Defendant-Respondent. M. Weissberg

5992 THE PEOPLE OF THE STATE OF NEW YORK,
Appellant, D. D. Darcy
—against—
VICTOR ECHAVARRY, JR.,
Defendant-Respondent. M. Weissberg

Orders, Supreme Court, Bronx County (Massi, J.), entered April 3, 1972 granting defendants' motions to the extent of dismissing the First (Criminal Tampering in the First Degree, Penal Law sec. 145.20) and Third (Official Misconduct, Penal Law sec. 195.00) counts of each of the indictments are modified on the law to the extent of rein-

stating count One of each indictment, and as so modified the orders are affirmed.

Initially, we note that on June 16, 1972 the defendants were again indicted for Official Misconduct and were subsequently arraigned. Accordingly, the issues as to the propriety of the dismissal of count Three of the original indictment have been rendered academic (CPL 200.80).

With respect to count One we hold that such is sufficient and should not have been dismissed. Trial Term held that a bridge may not be considered a "public utility operated by a municipality" within the meaning of Penal Law sec. 145.20. In so doing, it stated that such clause "is used in a restricted sense and limited to services similar to those listed and specified as being owned by corporations, which immediately precedes the clause in question." And further, Trial Term commented that "any other interpretation would render the undefined provision vague and indefinite, and require speculation as to what might be considered to come within its meaning."

We cannot agree. The term "public utility", has been given broad meaning and has been held to include diverse services (see e.g., *Seideman* v. *City of New York,* 264 App. Div. 359; *Staminski* v. *Romeo,* 62 Misc. 2d 1051). The clause in question, when given its usual and ordinary meaning, simply means the furnishing of services to the public by a governmental authority and such necessarily includes bridges. This is the concept common to the cases which have considered its meaning and conforms with general usage.

Moreover, to limit the meaning of the subject clause in the manner construed by Trial Term, would nullify the entire statutory scheme and purpose. Under the prior Penal Law there were specific and detailed provisions covering numerous public utility property (see e.g., Penal Law, sec. 1422 (signal or light); sec. 1423 (public high-

way or bridge)). In the new Penal Law the Legislature did not list separately each public utility property but instead, continued the prior prohibitions under one comprehensive term. In this regard the following is stated in the Practice Commentary to Penal Law sec. 145.15: "This is an important and useful inclusive section covering a host of offenses against public utility property which was separately defined in exhaustive and unnecessary detail in the former Penal Law . . . ." (Denzer & McQuillan, Practice Commentary to Penal Law, sec. 145.15, book 39 McKinney's p. 386.)

Accordingly, the First Count in each indictment should be reinstated.

Orders filed.

Appendix F, Order of Appellate Division.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 30, 1972.

Present—Hon. Owen McGivern, *Justice Presiding,*
Emilio Nunez,
Aron Steuer,
George Tilzer,
Louis J. Capozzoli,
Justices,

5990

The People of the State of New York,
Appellant,

—against—

Daniel Siciliano,
Defendant-Respondent.

An appeal having been taken to this Court by the appellant from an order of the Supreme Court, Bronx County (Massi, J.), entered on April 3, 1972, granting defendant's motion to the extent of dismissing the first and third counts of the indictment, and said appeal having been argued by Mr. Dwight D. Darcy of counsel for the appellant, and by Mr. Morris Weissberg of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court field herein,

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, to the extent of reinstating the first count of the indictment, and, as so modified, the order is affirmed.

ENTER:
/s/ HYMAN W. GAMSO
Clerk.

Appendix F, Order of Appellate Division.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 30, 1972.

Present—Hon. Owen McGivern, *Justice Presiding,*
Emilio Nunez,
Aron Steur,
George Tilzer,
Louis J. Capozzolli,
Justices.

5992

The People of the State of New York,
Appellant,

—against—

Victor Echavarry, Jr.,
Defendant-Respondent.

An appeal having been taken to this Court by the appellant from an order of the Supreme Court, Bronx County (,Massi, J.), entered on April 3, 1972, granting defendant's motion to the extent of dismissing the first and third counts of the indictment, and said appeal having been argued by Mr. Dwight D. Darcy of counsel for the appellant, and by Mr. Morris Weissberg of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, to the extent of reinstating the first count of the indictment, and, as so modified, the order is affirmed.

Enter:
/s/ Hyman W. Gamso
Clerk.

Appendix F, Order of Appellate Division.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 30, 1972.

Present—Hon. OWEN MCGIVERN, *Justice Presiding*
EMILIO NUNEZ,
ARON STEUER,
GEORGE TILZER,
LOUIS J. CAPOZZOLI,
Justices.

5991

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

—against—

DANIEL GIBSON,
Defendant-Respondent.

An appeal having been taken to this Court by the appellant from an order of the Supreme Court, Bronx County (Massi, J.), entered on April 3, 1972, granting defendant's motion to the extent of dismissing the first and third counts of the indictment, and said appeal having been argued by Mr. Dwight D. Darcy of counsel for the appellant, and by Mr. Morris Weissberg of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, to the extent of reinstating the first count of the indictment, and, as so modified, the order is affirmed.

ENTER:

/s/ HYMAN W. GAMSO
Clerk.

Appendix F, Order and Decision of Court of Appeals.

COURT OF APPEALS, STATE OF NEW YORK

1 No. 295/124 73

The People &c.,
Respondent,

vs.

Daniel Siciliano, Daniel Gibson, and
Victor Echavarry, Jr.,
Appellants.

Orders affirmed on the memorandum at the Appellate Division.

All concur except Jones, J., who dissents and votes to reverse on the opinion by Mr. Justice Vincent A. Massi at Trial Term.

Appendix G, Order of Court of Appeals.

COURT OF APPEALS, STATE OF NEW YORK

Mo. No. 1068

The People &c.,

Respondent,

vs.

Daniel Siciliano,

Appellant.

& two other titles—Peo. v. Echavarry, Peo. v. Gibson.

Motion by the Attorney General for an order pursuant to Executive Law § 71 granted.
Nov 16 1976

Appendix H, Order and Decision, Court of Appeals.

COURT OF APPEALS : STATE OF NEW YORK

1 Mo. No. 103

The People &c.,

Respondent,

vs.

Daniel Siciliano, Victor Echavarry, Jr., and Daniel Gibson,

Appellants.

Motion to amend the remittitur or for reconsideration denied.

Supreme Court, U. S.
FILED
APR 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1226

DANIEL SICILIANO, VICTOR ECHAVARRY, JR., and DANIEL GIBSON,

Appellants,

v.

THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1226

DANIEL SICILIANO, VICTOR ECHAVARRY, JR., and DANIEL GIBSON,

Appellants,

v.

THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, moves this Court to dismiss the appeal or, in the alternative, to affirm the order and final judgment of the Court of Appeals of the State of New York on the grounds that the decision was clearly correct and that the federal questions sought to be reviewed are so unsubstantial as not to need further argument.

Opinions Below

The *per curiam* decision of the Court of Appeals of the State of New York is reported at 40 N.Y.2d 996, 391 N.Y.S. 2d 106, 359 N.E.2d 700. The order and opinions of the Appellate Division, First Department, affirming the judgments of conviction of appellants in Supreme Court, Bronx County, are reported at 52 App.Div.2d 408, 384 N.Y.S.2d 994.

Jurisdiction

The order and final judgment of the Court of Appeals of the State of New York was entered on December 16, 1976. Appellants filed a notice of appeal in the Court of Appeals on February 18, 1977. The jurisdictional statement to this Court was filed by appellants on March 4, 1977. The appellants have invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(2).

Questions Presented

1. Whether appellants' voluntary and intelligent pleas of guilty to the crime of Obstructing Governmental Administration, entered on the advice of competent counsel, foreclose inquiry into their claims that the grand jury which indicted them was unconstitutionally selected.

2. Whether New York Judiciary Law §598, which disqualifies from grand jury service all public officers and employees of the federal, state and municipal governments who receive annual compensation in excess of one thousand

dollars, is repugnant to the Constitution of the United States under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

3. Whether New York Penal Law §§145.20, 195.05, which define the crimes of Criminal Tampering in the First Degree and Obstructing Governmental Administration, are repugnant to the Constitution of the United States under Article VI, Clause 2, as applied to appellants, because the application of the penal statutes to appellants is preempted by federal statute, 33 U.S.C. §499.

Statement of the Case

On June 7, 1971, the City of New York was afflicted with a case of labor difficulties in the form of a strike by Local 237 of the International Brotherhood of Teamsters. Daniel Siciliano, Victor Echavarry, Jr., and Daniel Gibson were members of this striking union and were employed by the City as bridge tenders. Each of these three individuals was responsible for the opening and closing of a drawbridge in Bronx County: Siciliano, the Unionport Bridge; Echavarry, the Pelham Bridge; and Gibson, the Hutchinson River Parkway Bridge. Each of the bridges involved was a link in a major artery for vehicular traffic entering and leaving New York City, and each carried this traffic over a navigable body of water.

On the morning of June 7, 1971, in furtherance of a plan conceived by the union to enhance its strike by maximizing disruption, each appellant opened his bridge so that no vehicles could traverse the span. Each appellant then re-

moved certain electrical equipment so that the bridge could not be closed and then each proceeded to walk off his job, allowing chaos to reign on the banks of the waterway.

After a thorough investigation, the Grand Jury of Bronx County returned separate three-count indictments on July 27, 1971, charging appellants with Criminal Tampering in the First Degree, Obstructing Governmental Administration, and Official Misconduct.

On August 31, 1971, appellants moved in Supreme Court, Bronx County, for orders directing the inspection of the grand jury minutes and dismissing the indictments. They claimed that a bridge is not a "public utility" within the meaning of New York Penal Law §145.20, and that the acts of which they were accused did not constitute the crime of Tampering. They attacked the second count of the indictment on the grounds that it was predicated on the first count. Finally, the last count charging Official Misconduct was alleged to be devoid of the requisite specificity. The People opposed all of these propositions. On April 3, 1972, Justice Vincent A. Massi partially granted the motions, ordering that the first and third counts of each indictment be dismissed [77 Misc.2d 49, 354 N.Y.S.2d 273 (Sup. Ct. Bronx Co. 1972)]. On June 16, 1972, the third count of each indictment, charging appellants with Official Misconduct, was resubmitted to the Grand Jury of Bronx County, which returned separate two-count indictments, charging appellants with Official Misconduct.

The People appealed from the orders of Justice Massi to the Appellate Division, First Department. On November 30, 1972, the Appellate Division modified the orders by re-

instating the first count of each indictment, charging appellants with Criminal Tampering in the First Degree [40 App.Div.2d 818, 338 N.Y.S.2d 478 (1st Dept. 1972)]. Appellants were granted leave to appeal from the orders of the Appellate Division to the Court of Appeals of the State of New York on January 19, 1973. On March 20, 1974, the Court of Appeals affirmed the orders on the memorandum at the Appellate Division [34 N.Y.2d 575, 354 N.Y.S.2d 945, 310 N.E.2d 542 (1974)].

On May 25, 1974, appellants moved in Supreme Court, Bronx County, for orders dismissing the indictments on the grounds that the grand jury proceeding was defective. They alleged that the grand jury which returned the indictments was illegally constituted in that New York Judiciary Law §598, which disqualifies from grand jury service all public officers and employees of the federal, state and municipal governments who receive annual compensation in excess of one thousand dollars, is unconstitutional. In addition, in a supplemental affirmation of July 9, 1974, they claimed that the grand jury pool had been selected as a result of purposeful discrimination against women. The People opposed these motions in all respects. On October 7, 1974, Justice Herbert B. Evans denied the motions [79 Misc. 2d 509, 360 N.Y.S.2d 559 (Sup. Ct. Bronx Co. 1974)].

On November 4, 1974, appellants petitioned the Appellate Division, First Department, for a judgment pursuant to Article 78 of the New York Civil Practice Law and Rules in the nature of a writ of prohibition, seeking the following relief: (1) that the Justices of the Supreme Court, Bronx County, and the District Attorney of Bronx County be prohibited from exercising any jurisdiction over appellants;

(2) that the indictments be dismissed; and (3) that New York Judiciary Law §598 be declared unconstitutional. Appellants raised the same claims as they had alleged in their motions before Justice Evans. The petition was consolidated with a similar petition against public officials of New York County, which presented the same legal issues. The District Attorney of Bronx County moved to dismiss the petition on the grounds that the writ of prohibition would not lie and was therefore an inappropriate remedy. On December 3, 1974, the Appellate Division denied the application for a writ of prohibition and granted the motion to dismiss the petition [46 App.Div.2d 858 (1st Dept. 1974)]. Appellants filed a notice of appeal to the Court of Appeals of the State of New York as of right on December 5, 1974, and also sought leave to appeal to the Court of Appeals. The Attorney General of the State of New York and the District Attorney of Bronx County moved to dismiss the appeals taken as of right and opposed the application for leave to appeal. The Court of Appeals of the State of New York denied the application by appellants for leave to appeal on the grounds that the remedy sought under Article 78 was unavailable; the court also granted the motions to dismiss the appeals taken as of right by appellants on the grounds that no constitutional question was directly involved [35 N.Y.2d 990, 993, 365 N.Y.S.2d 533, 324 N.E.2d 889 (1975)].

On February 11, 1975, appellants moved in Supreme Court, Bronx County, to reargue their motions previously denied by Justice Evans on October 7, 1974. The motions were reargued, and the People opposed the appellants' contentions in all respects. On July 28, 1975, Justice Evans

denied the motions. A supplemental motion to dismiss the indictments in furtherance of justice was also made by appellants. However, this additional motion was rendered moot by appellants' pleas of guilty before Justice William J. Drohan on September 18, 1975, to the crime of Obstructing Governmental Administration, in full satisfaction of all charges pending against them.

On February 27, 1976, appellants were each sentenced to a period of probation of three years and a fine of one thousand dollars. The period of probation was imposed upon the condition that during the probationary period appellants accept no promotions from their present positions.

On June 10, 1976, the judgments of conviction were affirmed by the Appellate Division, First Department [52 App.Div.2d 408, 384 N.Y.S.2d 994 (1st Dept. 1976)], in an opinion by Birns, J. Three other opinions were also filed: Markewich and Capozzoli, JJ., concurring in part and dissenting in part; Lupiano, J., concurring in part and dissenting in part; and Kupferman, J., concurring in part and dissenting in part. Leave to appeal to the Court of Appeals of the State of New York was granted by Kupferman, J., on June 14, 1976.

On appeal to the Court of Appeals of the State of New York, appellants asserted that their constitutional rights were violated because the grand jury which returned the indictments against them was illegally constituted. They claimed that (1) New York Judiciary Law §598, which disqualifies public officers and employees of the federal, state and municipal governments receiving annual compensation in excess of one thousand dollars from serving on a grand

jury, is unconstitutional; and (2) there was a systematic and intentional discrimination against women in the selection of the jury pool from which the grand jury was impaneled. Appellants also alleged that the indictments were invalid on the grounds that their actions complied with federal law, which preempts state jurisdiction under the Supremacy Clause of the Constitution. They therefore requested that the judgments be reversed and the indictments dismissed. In addition, appellants maintained that the sentences imposed were invalid, and requested that they be set aside. The People contended that (1) appellants' voluntary and intelligent pleas of guilty to the crime of Obstructing Governmental Administration, entered on the advice of competent counsel, foreclosed inquiry into their claims that the grand jury which indicted them was unconstitutionally selected; (2) New York Judiciary Law §598 is constitutional; (3) the grand jury was selected from a fair cross-section of the community, without any systematic and purposeful exclusion of women; (4) New York Penal Law §§145.20, 195.05 are constitutional as applied to appellants, unaffected by the Supremacy Clause of the Constitution of the United States; and (5) the sentences imposed were legally authorized and the conditions of probation were properly imposed. In sum, the People submitted that the judgments should be affirmed. On December 16, 1976, the Court of Appeals of the State of New York affirmed the order of the Appellate Division, First Department, in a *per curiam* decision [40 N.Y.2d 996, 391 N.Y.S.2d 106, 359 N.E.2d 700 (1976)]. On February 15, 1977, the court denied appellants' motion to amend the remittitur or for reconsideration of the appeal.

ARGUMENT

I.

Appellants' voluntary and intelligent pleas of guilty to the crime of Obstructing Governmental Administration, entered on the advice of competent counsel, foreclose inquiry into their claims that the grand jury which indicted them was unconstitutionally selected.

The Court of Appeals of the State of New York was clearly correct in its decision that appellants' voluntary and intelligent pleas of guilty to one of the lesser included counts of the indictments foreclosed further inquiry into their claims concerning the selection processes of the grand jury which indicted them. The pleas of guilty were entered on the advice of counsel, and appellants admitted to the court that they were guilty of the acts charged in the indictments. The voluntary and intelligent character of the pleas of guilty has never been challenged in the state courts, nor is it challenged in this appeal.

This Court has recognized that a plea of guilty is a grave act, for it rests on the accused's admission in open court that he committed the acts charged in the indictment. Such an admission, which an accused cannot be compelled to make, must be the voluntary expression of his own choice [*Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Machibroda* v. *United States*, 368 U.S. 487, 493 (1962); *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927)]. In addition, this Court has noted that a plea of guilty carries with it profound consequences, for its constitutes the accused's consent that a judgment of conviction may be entered with-

out a trial. Thus, waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences [*Brady* v. *United States, supra,* at 748; *Boykin* v. *Alabama,* 395 U.S. 238, 242-244 (1969); *McCarthy* v. *United States,* 394 U.S. 459, 466 (1969)].

In light of the weight and significance attached to a plea of guilty, this Court has refused to address the merits of a variety of alleged deprivations of constitutional rights that preceded the accused's decision to plead guilty: a claim that a burden created by statute placed on the exercise of Fifth and Sixth Amendment rights at the peril of a possible death penalty motivated the decision to plead guilty [*Brady* v. *United States, supra; Parker* v. *North Carolina,* 397 U.S. 790 (1970)]; a claim that a coerced confession obtained by the State which, at the time, could not be tested except by proceeding to trial, motivated the decision to plead guilty [*McMann* v. *Richardson,* 397 U.S. 759 (1970)]; and a claim that a racial group was systematically excluded from service on the grand jury [*Tollett* v. *Henderson,* 411 U.S. 258 (1973)].

In *Tollett,* this Court reaffirmed the principle recognized in the *Brady* trilogy, that

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offenses with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the

> advice he received from counsel was not within the standards set forth in McMann [*Tollett* v. *Henderson, supra,* at 267]

and thus outside

> the range of competence demanded of attorneys in criminal cases [*Tollett* v. *Henderson, supra,* at 266, citing *McMann* v. *Richardson, supra,* at 771].

Moreover, in *Tollett,* factors existed in favor of the accused not present in the case at bar: (1) the State had conceded and the lower court had found, unlike here, that there in fact had been systematic exclusion of an identifiable group in the selection of the grand jury; and (2) the facts giving rise to the constitutional claims were unknown to both the accused and his attorney prior to the entry of the plea of guilty, unlike here [*Tollett* v. *Henderson, supra,* at 259-260, 266]. Despite these circumstances, this Court held that the plea of guilty foreclosed inquiry into the merits of the claimed antecedent constitutional violation, *i.e.,* the claim of discrimination in the selection of the grand jury [*Tollett* v. *Henderson, supra,* at 266]. Certainly, where an accused and his counsel are fully aware of a possible challenge to the composition of the grand jury and deliberately enter a plea of guilty to lesser charges, such action must be construed as a knowing waiver. It is noteworthy that the dissenters in *Tollett,* concerned with the fact that the accused and his attorney were not cognizant of the constitutional violations prior to the entry of the plea of guilty, commented that "guilty pleas, because they operate as a waiver of constitutional rights, 'must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances* and likely consequences' " [*Tollett* v. *Hender-*

son, supra, at 272 (Marshall, Douglas, Brennan, JJ., dissenting) (emphasis in original)]. The case at bar, unlike *Tollett,* meets even these more stringent standards, for it was clear that under New York law, any claims of antecedent constitutional violations other than those involving motions to suppress evidence under Article 710 of the New York Criminal Procedure Law and claims directed toward the sufficiency of the accusatory instrument on its face would be waived [see New York Criminal Procedure Law §710.70 (2); *Lefkowitz* v. *Newsome,* 420 U.S. 283 (1975); *People* v. *Harper,* 37 N.Y.2d 96, 99, 371 N.Y.S.2d 467, 332 N.E.2d 336 (1975); *People* v. *Nicholson,* 11 N.Y.2d 1067, 230 N.Y.S.2d 220, 184 N.E.2d 190 (1962); *People* v. *Scott,* 3 N.Y.2d 148, 152-153, 164 N.Y.S.2d 707, 143 N.E.2d 901 (1957)]. Indeed, this Court has remarked that once an accused pleads guilty and therefore fails to preserve his constitutional claims for appellate review "in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained" [*Lefkowitz* v. *Newsome, supra,* at 289].

It is clear that there is a fundamental distinction between "antecedent constitutional violations," *i.e.,* deprivations of constitutional rights that occurred prior to the entry of the guilty plea, and constitutional violations which concern "the very power of the State to bring the defendant into court to answer the charge brought against him" [*Blackledge* v. *Perry,* 417 U.S. 21, 30 (1974)]. This Court has stated that "even a tainted indictment of the sort alleged in *Tollett* could have been 'cured' through a new indictment by a properly selected grand jury" [*Blackledge* v. *Perry, supra,* at 30]. Thus, claims grounded on the "right

not to be haled into court at all" [*Blackledge* v. *Perry, supra,* at 30] carry weightier consequences than claims concerning the composition of the grand jury, which involve inherently curable defects.

Thus, the rationale of the *Brady* trilogy and *Tollett* is that

> a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established [*Menna* v. *New York,* 423 U.S. 61, 62 n2 (1975) (emphasis in original)].

The claim presented here attacking the selection of the grand jury, identical in form to the claim presented in *Tollett,* is therefore rendered irrelevant by the voluntary and intelligent pleas of guilty by appellants, entered with the advice of competent counsel, for the claimed violation is not logically inconsistent with the fact of appellants' guilt.

II.

New York Judiciary Law §598 is constitutional.

The Court of Appeals of the State of New York was clearly correct in its decision that New York Judiciary Law §598, which disqualifies from grand jury service all public officers and employees of the federal, state and municipal governments who receive annual compensation in excess of

one thousand dollars, does not violate the Due Process or Equal Protection clauses of the Fourteenth Amendment.

The statute [added L. 1940, c. 202 §1; amended L. 1942, c. 799 §5; L. 1943, c. 147 §1; L. 1951, c. 769 §1; L. 1953, c. 541 §1] was enacted as part of a total revision of the law regarding the administration of the jury system in the City of New York as recommended by the Judicial Council of the State of New York [see Law of New York, 163d session, L. 1940, c. 202 §1, p. 769].* After several years of effort and study, the culmination of exhaustive research into the administration of the jury system, the Judicial Council presented a proposal for a new Article 17 of the New York Judiciary Law, designed to create and govern a unified jury system in the City of New York. The recommendations proposed that the new statutes be supplemented with rules to be promulgated by the Appellate Divisions [see Sixth Annual Report of the Judicial Council of the State of New York, 1940, pp. 41-44, 195-198]. New York Judiciary Law §598 as enacted adopted the proposed draft prepared by the Council verbatim. The comment accompanying the proposed draft of the statute reveals its purpose and intent:

> [t]he last paragraph was recommended by the Grand Jury Association of New York County, on the ground that, although it is the practice not to place such persons on grand juries, specific provision to that effect should be included in the law because of the quasi-judicial, quasi-prosecuting character of grand juries when investigating official corruption [Sixth Annual Report of the Judicial Council of the State of New York, 1940, pp. 207-208].

* The Judicial Council of the State of New York was created and governed by New York Judiciary Law §§40-48 [added L. 1934, c. 128 §1; amended L. 1936, c. 231; L. 1939, c. 7; L. 1941, c. 9; L. 1942, c. 241]; the Council was "under the duty of continuous study of the procedures of the courts and making recommendations for improvement to the Legislature" [*Fay* v. *New York*, 332 U.S. 261, 278 (1947)]. These statutes were repealed, effective April 1, 1955 [L. 1955, c. 869 §2], and the Council was succeeded by the present Judicial Conference of the State of New York [New York Judiciary Law §§210-239].

It seems clear that the New York Legislature, in enacting this provision, sought to further the purposes of the New York State Constitution, Article I §6, which emphasizes the power of grand juries to inquire into the wilful misconduct of public officers. In addition, New York Criminal Procedure Law §§190.05, 190.55(1), 190.85(1) govern the functions of grand juries to hear and examine evidence concerning misconduct, nonfeasance and neglect in public office by public servants. Thus, in light of the explicit duty of the grand jury to investigate the misconduct of public officers and other public servants, it is obvious that the purpose and intent of New York Judiciary Law §598 is to reinforce state policy that the grand jury be an independent institution by removing all influences and appearances of influence by government from its membership.

That the grand jury as an institution has historically been an independent body with quasi-judicial and investigatory functions cannot be disputed. This Court has recognized the traditional wide latitude accorded the grand jury to inquire into violations of criminal law, to deliberate in secret, to determine alone the course of its inquiry, and to proceed in its investigation generally unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials [*United States* v. *Calandra*, 414 U.S. 338, 343 (1974)]. The investigatory powers of

the grand jury are not narrowly limited [*Blair* v. *United States,* 250 U.S. 273, 282 (1919)], and must be broad if its public responsibility to insure fair and effective law enforcement is adequately to be discharged [*United States* v. *Calandra, supra,* at 343-344; *Branzburg* v. *Hayes,* 408 U.S. 665, 700 (1972); *Costello* v. *United States,* 350 U.S. 359, 364 (1956)]. In an effort to insure that grand juries in New York are untouched by influence, so that they may be able to independently conduct thorough investigations of criminal activity, including misconduct of public officers and public servants, the New York Legislature has seen fit to disqualify those citizens who depend upon government for their livelihood.

The classification which New York Judiciary Law §598 establishes is not patently arbitrary and bears a significant rational relationship to the legitimate governmental interest involved [*Jefferson* v. *Hackney,* 406 U.S. 535, 546 (1972); *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971); *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970); *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961)]. The rationale of the statute has been discussed and approved in lower federal courts, one of which has concluded that "rational people could surely entertain the broad underlying premises that those dependent upon government for substantial income might be unsuitably conflicted if they served as jurors" [*United States ex rel. Epton* v. *Nenna,* 318 F.Supp. 899, 904 (S.D.N.Y. 1970), *aff'd,* 446 F.2d 363 (2d Cir. 1971)] [see also *Fay* v. *New York, supra,* at 292 n 35]. The exclusion of public officers and governmental employees, based upon the possibility of conflict, "can be supported as a precaution against over timidity toward the authority supporting them" [*United States ex rel. Chestnut* v. *Crim. Ct.*

of City of New York, 442 F.2d 611, 619 (2d Cir. 1971)]. Thus, grand jurors closely associated to government and responsible in their employment to elected or appointed officials might not be as independent as the New York Legislature would deem necessary to perform the duty of the grand jury to investigate misconduct of public officers and other public servants.

The New York Legislature might also have foreseen the possibility that grand juries investigating criminal activity which does not involve official action might be biased in favor of the government if their members are drawn from those employed by government. Thus, it has been recognized that those "who receive their sustenance from the state, might be viewed as potentially too timid to disagree with the prosecuting attorney, an important spokesman of the state from which they receive substantial benefits" [*United States ex rel. Chestnut* v. *Crim. Ct. of City of New York, supra,* at 617] [see also *Glasser* v. *United States,* 315 U.S. 60, 86 (1942)]. This possibility would be highly undesirable in light of the grand jury's power to "check a prosecutor's decision to proceed against a defendant, * * * undertake investigations and make formal accusations on its own initiative" [*United States ex rel. Chestnut* v. *Crim. Ct. of City of New York, supra,* at 616].

The classification embodied in New York Judiciary Law §598 does not violate the requirement that the grand jury must be drawn from a fair cross-section of the community. It is clear that once the State chooses to provide the institution of the grand jury, the Constitution prohibits the systematic and purposeful exclusion of significant groups from the jury service, for the concept of an impartial jury proceeds on the assumption that it is drawn from a fair

cross-section of the community [*Taylor* v. *Louisiana,* 419 U.S. 522, 527-528, 530 (1975); *Peters* v. *Kiff,* 407 U.S. 493, 500 (1972); *Apodaca* v. *Oregon,* 406 U.S. 404, 410-411 (1972)]. But not all groups which can be labelled are encompassed within this rule. Systematic exclusions of racial groups from grand juries have long been held to be prohibited [*Peters* v. *Kiff, supra,* at 497; *Alexander* v. *Louisiana,* 405 U.S. 625 (1972); *Bush* v. *Kentucky,* 107 U.S. 110 (1883)], since Congress enacted a statute to this effect pursuant to the enabling act of the Fourteenth Amendment in 1875 [8 U.S.C. §44, presently 18 U.S.C. §243; see *Fay* v. *New York, supra,* at 282-283]. Since then, the principle has been applied "to any identifiable group in the community which may be the subject of prejudice" [*Swain* v. *Alabama,* 380 U.S. 202, 205 (1965)], as distinct ethnic groups shown to exist within a community and subject to community biases [*Castaneda* v. *Partida,* —— U.S. —— (No. 75-1552, March 23, 1977); *Hernandez* v. *Texas,* 347 U.S. 475, 477-479 (1954)], or substantial portions of the community, as daily wage earners [*Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 223 (1946)] and women [*Taylor* v. *Louisiana, supra,* at 524, 530-531, 534 (53% of eligible jurors)]. But all groups which can be categoribed and identified do not constitute identifiable groups entitled to group-based protection, as this Court observed concerning the allegedly cognizable class of "young adults" [*Hamling* v. *United States,* 418 U.S. 87, 136-137 (1974)].

The classification defined in New York Judiciary Law §598 does not constitute a significant group which is either the subject of community prejudice or a substantial portion of the community, the exclusion of which prevents grand juries from constituting a fair cross-section of the community. Public officers and government employees include persons of all races, ages, occupations, economic groups, social groups, geographic areas, religions, political viewpoints, and both sexes. Although appellants complain that the acts investigated by the grand jury, arising from public employment, required that public employees be represented in the jury pool, it is perhaps more relevant to note that the acts investigated by the grand jury arose from a labor dispute. Yet, there is no claim, nor could there be, that union members were not represented in the jury pool [see *Fay* v. *New York, supra,* at 293-294].

Finally, the intrinsic differences between grand and petit jury service justify the disqualification defined in New York Judiciary Law §598 as to grand juries alone [see *Castaneda* v. *Partida, supra* (Powell, Burger, Rehnquist, JJ., dissenting)]. The narrowly defined purpose of a petit jury to find facts presented to it in an adversary proceeding, within the framework of procedural and evidentiary rules, contrasts sharply with the autonomous character of the grand jury which operates without the aid of a judge and determines the scope of its inquiry. Reflecting these differences, the procedures available for challenging petit jurors [see NewYork Criminal Procedure Law §§270.15, 270.20] are much broader than the limited procedures available to challenge grand jurors [see New York Criminal Procedure Law §190.20(2); Practice Commentary, Richard G. Denzer, McKinney's Cons. Laws of New York, Book 11A, NYCPL §190.20, p. 104].

III.

New York Penal Law §§145.20, 195.05 are constitutional as applied to appellants, unaffected by the Supremacy Clause of the Constitution of the United States.

The federal question whether New York Penal Law §§145.20, 195.05 are repugnant to the Constitution of the United States under Article VI, Clause 2, as applied to appellants, because the application of the penal statutes to appellants is preempted by federal statute, 33 U.S.C. §499, is so unsubstantial as not to need further argument.

While it is clear that "acts of State Legislatures * * * [which] interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution," [*Gibbons* v. *Ogden,* 9 Wheat. 1 (1824)] are invalid under the Supremacy Clause [see *Perez* v. *Campbell,* 402 U.S. 637, 649 (1971); *Kelly* v. *Washington,* 302 U.S. 1, 4, 8 (1937)], it is obvious that New York Penal Law §§145.20, 195.05 as they were applied to appellants in the indictments are not in direct conflict with 33 U.S.C. §499 [28 Stat. 362, c. 299 §5 (1894)]. The federal statute seeks to proscribe the wilful failure, refusal, or neglect to open draws of bridges across navigable waters, while the state penal statutes as applied proscribe tampering with bridges with intent to cause a substantial interruption and impairment of service rendered to the public and effecting that result.

Moreover, since a state can exercise police power even though interstate commerce may be affected [*Kelly* v. *Washington, supra,* at 9-10], federal law will not displace

state action unless there is a clear and manifest purpose of Congress to do so [*DeCanis* v. *Bica,* 424 U.S. 351, 47 L. Ed.2d 43, 50 (1976); *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 146 (1963)]. No such purpose by Congress to preempt state power to regulate drawbridges over navigable waters has ever been stated.

Under none of the criteria established by this Court can it be argued that Congress intended to preempt state regulation of the operation of drawbridges over navigable waters, since the federal regulation is not pervasive, the federal interest is not dominant, there is no interference with any federal program, and federal policy is not thwarted [see *DeCanis* v. *Bica, supra,* at 49, 50 n5, 53; *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470, 479 (1974); *Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624, 633 (1973); *Pennsylvania* v. *Nelson,* 350 U.S. 497, 501-507 (1956); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230-231, 236 (1947); *Hines* v. *Davidowitz,* 312 U.S. 52, 62 n22, 67 (1941)].

On the contrary, the State of New York has exercised its police power to establish rules applicable on land and water within its limits. Such state regulation is certainly permissible, even though such rules incidentally affect maritime affairs, provided that the state action does not contravene any acts of Congress [*Askew* v. *American Waterways Operators,* 411 U.S. 325, 334, 337-339, 341-343 (1973); *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 442 (1960); *Skiriotes* v. *Florida,* 313 U.S. 69, 75 (1941)]. The New York penal statutes involved constitute the exercise of police power only incidentally affecting maritime affairs,

and are directed specifically toward a public utility operated by a municipality. These statutes do not contravene the federal statute, for the federal and state statutes are aimed at different objectives which are complementary, and create criminal penalties for acts which have very different elements.

Conclusion

The motion to dismiss the appeal or, in the alternative, to affirm the order and final judgment of the Court of Appeals of the State of New York, should be granted.

Respectfully submitted,

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March 28, 1977

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

DOCKET NO. 76-1226

DANIEL SICILIANO, VICTOR ECHAVARRY, JR., and DANIEL GIBSON,

Appellants,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' RESPONSE TO MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

DOCKET NO. 76-1226

DANIEL SICILIANO, VICTOR ECHAVARRY, JR., and DANIEL GIBSON,

Appellants,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' RESPONSE TO MOTION TO DISMISS OR AFFIRM

Appellants submit this brief in response to the State's motion to dismiss this direct appeal or to affirm the final judgment and order of the New York Court of Appeals.

I.

The State's "Waiver" Argument.

The State asserts that the Court of Appeals held that appellants' Equal Protection and Due Process challenge to the statutory exclusion of all of appellants' peers from all grand jury service was "foreclosed [from] further inquiry" because appellants entered guilty pleas (Appellee Br. 9). The Court of Appeals made no such ruling (Appendix C, 16a).

The record discloses that in timely *pre*-conviction proceedings appellants unsuccessfully challenged the constitutionality of N.Y. Judiciary Law § 598 and its absolute class exclusion of all of appellants' peers. (Appendix E, 42a-54a). New York's appellate courts then ruled that that issue could *only* be reviewed in *post*-conviction proceedings (*id.* at 55a-57a, 60a). The record also discloses that the touchstone facts—i.e., that appellants opened the bridges—were never disputed and that the only contested issues were legal issues, including particularly the constitutional issues here presented (Appendix D, 27a-29a and fns. 2-4 thereto).

Hence, once the New York Courts had determined (a) that the challenged penal law provision constitutionally applied and (b) that appellants' grand jury challenge could *only* be reviewed in *post*-conviction proceedings, appellants were constrained to enter pleas, which, upon the record, were coupled with an *explicit preservation* of appellate review rights (Appendix D, 26a-28a and fns. 2-4, 20a, 40a).

Appellants followed the *precise* procedure—a pre-plea motion coupled with a plea specifically preserving appellate review rights—dictated and authorized by the cases[1] and by statute.[2]

The Appellate Division majority approved that procedure and explicitly ruled that, by thus properly proceed-

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[1] *People* v. *Chirieleison,* 3 N.Y.2d 170, 173-74 (1957); *United States* v. *Burke,* 517 F.2d 377, 379 (2d Cir. 1975). *Accord, United States ex rel. Scranton* v. *State of N.Y.,* 532 F.2d 292 (2d Cir. 1976); *People* v. *Blakely,* 34 N.Y.2d 311, 314 (1974); *People* v. *White,* 32 N.Y.2d 393 (1973); *People* v. *Henderson,* 20 N.Y.2d 303 (1967). *See also, Lefkowitz* v. *Newsome,* 420 U.S. 283, fn. 7 at 290-91, 293 (1975); *United States* v. *Zudick,* 523 F.2d 848, 853 (3rd Cir. 1975); *United States* v. *Doyle,* 348 F.2d 715 (2d Cir.), *cert. denied,* 382 U.S. 843 (1965).

[2] N.Y. Criminal Procedure Law § 210.20(2). *See, Langella* v. *Com'r. of Corrections, State of N.Y.,* 413 F. Supp. 1214, 1216-17 (S.D.N.Y.), *aff'd,* 545 F.2d 818 (2d Cir. 1976).

ing, appellants had *not* waived, but instead had *preserved,* their right to appellate review (Appendix D, 19a, 20a, 26a-32a, 40a). The Court of Appeals *affirmed* (Appendix C, 16a). It did not dismiss appellants' appeal as the State misrepresents (*Ibid*).[3]

The only authority cited by the State to support its waiver notion is *Tollett* v. *Henderson,* 411 U.S. 258 (1973) and certain related cases. *Tollett* rebuffed a state prisoner's attempt to use federal *habeas corpus* proceedings to challenge grand jury selection procedures long *after* he had pleaded guilty *without making* timely *pre*-plea objection to grand jury composition. As was held in the Appellate Division (Appendix D, 29a-32a), the *Tollett* rationale clearly has no application to the present case, in which the appellants not only made *timely pre*-plea objection and sought to obtain appellate review thereof *prior* to plea, but also, when that review was denied, pleaded guilty with an explicit preservation of appellate review rights in precise conformity with established state procedure (*supra,* p. 3, fns. 1, 2).

The State has not cited any Supreme Court decision holding that a guilty plea automatically waives *timely* and properly made and preserved objections. Indeed, two recent Supreme Court decisions (both involving New York practice) recognize that a guilty plea is *not* an automatic waiver of properly made and preserved pre-plea objections. *Menna* v. *New York,* 423 U.S. 61 (1975); *Lefkowitz* v. *Newsome, supra,* 420 U.S. 283.

In any event, as this Court recently ruled in *Castaneda* v. *Partida,* —— U.S. ——, 45 L.W. 5302, 4303, fn. 4 (March 22, 1977), where, as here, the State courts have considered

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[3] A majority of the Appellate Division had held that appellants' grand jury challenge based on *conceded sex discrimination practices* had, however, not been sufficiently documented or had been waived (Appendix D, 18a-22a). The Court of Appeals agreed that as to that issue waiver had occurred (Appendix C, 16a). That issue has not been tendered here.

appellants constitutional ". . . claim on its merits . . ., we are free to do so here. *Coleman* v. *Alabama*, 377 U.S. 129 (1964); cf. *Francis* v. *Henderson*, 425 U.S. 536, 542 n. 5 (1976)."[4]

The Appellate Division explicitly ruled that appellants had properly preserved their § 598 grand jury challenge, and the Court then considered the merits of that challenge, sustaining the constitutionality of § 598 and with it appellants' convictions (Appendix D, 18a-22a, 32a-36a, 40a-41a). The State acknowledges that the Court of Appeals *affirmed on the merits* (Appellee Br. 13-14), explicitly rejecting appellants' challenge to § 598 "under the Federal Constitution." (Appendix C, 16a).

Appellants' grand jury challenge thus is properly before this Court. *Castaneda* v. *Partida, supra*. *See, Menna* v. *New York, supra*, 423 U.S. 61.

II.

The Grand Jury Class Exclusion Issues.

A.

Castaneda Compels Summary Reversal

In *Castaneda* this Court recently reiterated the established principle that in grand, like petit, jury selection, the ". . . absolute exclusion of an identifiable group . . . constitutes a constitutional violation . . . ." *Supra*, 45 L.W. at 4305. Indeed, the dissent in *Castaneda* echoed that view, aptly stating the rationale which constitutionally precludes any *absolute class* exclusion of, *as here, all* of a criminal defendant's *peer* group:

> "That individuals are most likely to discriminate in favor of, than against, those who share their own

[4] Indeed, as observed in the Appellate Division, appellants' plea was conditioned upon a right of review (Appendix D, 27a-30a). *See, Henderson* v. *Morgan*, 426 U.S. 637, 648-51 (1976) (concurring opinion).

> favor of, than against, those who share their own identifiable attributes is the premise that underlies the cases recognizing that *the criminal defendant has a personal right under the Fourteenth Amendment not to have members of his class excluded from jury service. Discriminatory exclusion of members of the defendant's class has been viewed as unfairly excluding persons who may be inclined to favor the defendant.* See *Strauder* v. *West Virginia*, 100 U.S. at 309." *Supra*, 45 L.W. at 4311. (Powell, J., dissenting). (Emphasis supplied).[5]

Here personal prejudice is present. *All* of appellants' peers were statutorily and absolutely excluded from service. And the conclusion that the excluded class is identifiable and distinct is compelled by the fact that § 598 singles them out for different treatment. An identifiable, and hence cognizable, class ". . . is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Castaneda* v. *Partida, supra*, 45 L.W. at 4305.[6] Since, as we show below, there was no justification whatsoever for the absolute exclusion thus decreed (*infra*, pp. 6-11), reversal must follow. See, *Carter* v. *Jury Commission of Greene County*, 396

[5] Among the questions apparently left open or, at least, beclouded, by the opinions in *Castaneda* and which, we submit, merit prompt clarification is whether this Court has now rejected the broad principles of standing, articulated in *Peters* v. *Kiff*, 407 U.S. 493, 502-504 (1972) and reiterated in *Taylor* v. *Louisiana*, 419 U.S. 522, 526 (1975), that personal prejudice need not be shown to support a challenge to improper jury composition. The dissent in *Castaneda* seems to reject that view. The majority did not respond to or clarify the point. As members of the excluded class, appellants, in any event, are prejudiced and have standing.

[6] See, *Hoyt* v. *Florida*, 368 U.S. 57, 59-60 (1961), quoting from *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954). See also, *Taylor* v. *Louisiana, supra*, 419 U.S. at 530, 532 fn. 12. Having statutorily singled out this class for different treatment, it is absurd for the State to contend that that class is not identifiable or cognizable. Compare, *Castaneda* v. *Partida, supra*, 45 L.W. at 4305 with Appellee Br. 18.

U.S. 320, 330 (1970); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 223-24 (1946).

Moreover, the effect of the challenged statutory exclusion was not merely to exclude *all* of appellants' peers, but also to wholly exclude substantially in excess of *11%* of the otherwise qualified jury population and in excess of *18%* of the $6,000 to $19,999 peer group of middle income wage earners.[7] Thus the absolute peer exclusion here present simultaneously creates economic discrimination of precisely the kind abjured by this Court in *Thiel* v. *Southern Pacific Co., supra,* 328 U.S. 217.[8]

B.

The State's Defense of § 598 Lacks Merit

The premise which underlies the State's defense of New Yory's statutory exclusion of *all* of appellants' *peers* from *all* grand jury service is that such absolute exclusion is rationally founded.

The State argues that § 598 *rationally presumes* that *all* Federal, State, Local and other employees who receive in excess of $1000 from any governmental or quasi-governmental source are, *as a class,* biased or potentially too

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[7] *Compare, General Population Characteristics,* New York, U.S. Bureau of Census, Table 20 (Nov. 1971) with *Public Employment in 1972,* U.S. Bureau of Census, Tables 5-7 (Aug. 1973); *General Social and Economic Characteristics,* U.S. Summary, 1970 Census, Wash., D.C., June 1972, Table 84; *Government Workers, Subject Reports,* 1970 Census of Population, PC (2-7D, U.S. Bureau of the Census, Wash., D.C., June 1973, Table 9. These statistics, however, do *not* include quasi-public employees, part time, substitute or seasonal governmental employees, or volunteers in public service, *all* of whom are excluded by § 598 (See, 1942 N.Y. Attorney Gen'ls. Rep. 383; 1960 N.Y. Attorney Gen'ls. Rep. 181).

[8] In *Castaneda,* the majority explictly left open for resolution the question as to whether a showing of "simple economic discrimination"—even where such showing was *not, as it is here,* coupled with absolute peer exclusion—suffice *of itself* to abridge Fourteenth Amendment protections. *Supra,* 45 L.W. at 4305 n. 11. This case presents the appropriate vehicle for resolution of that issue.

timid to render honest service as grand jurors (Appellee Br. 16-17). The State, however, omits to explain the basis for its conclusive statutory presumption of class bias, *e.g.,* what bias a *Federal* postal clerk (or for that matter a State or City College professor) can *intrinsically* have either for or against one accused of rape or burglary. The State likewise omits to explain how, if class bias is to be rationally presumed based solely on the receipt of $1000 from a governmental or quasi-governmental source, such conclusive presumption rationally attaches *only* to grand jury service and evaporates when it comes to petit jury service, which that self-same class is *mandated* to render.[9]

Specifically referring to jury service by governmental employees, this Court has ruled that such presumptive bias notions are "without any rational foundation" and constitute a "serious reproach" to the administration of justice. *United States* v. *Wood,* 299 U.S. 123, 149-151 (1936). *Accord, Dennis* v. *United States,* 339 U.S. 162 (1950); *Frazier* v. *United States,* 335 U.S. 497 (1948).

Rationality is not a catchword to be invoked at will to cloak or excuse governmental excess; it is a reasoned, logical process. "Vague conjecture does not convince that Governmental employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors . . ." *Dennis* v. *United States, supra,* 339 U.S. at 172. "We think that the imputation of bias simply by virtue of governmental employment, without regard to actual partiality growing out of the nature and circumstances of particularized cases, rests on an assumption without any rational foundation." *United States* v. *Wood, supra,* 299 U.S. at 149.

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[9] Obviously, if bias could rationally be conclusively presumed as disqualifying all public employees from all grand jury service then, *perforce,* such persons should as a class be disqualified from all petit jury service, as is, for example, the case with judges. N.Y. Judiciary Law § 598(4); see *id.* at § 599.

Indeed, because of their familiarity with governmental operations and concerns, and their resultant exposure to a range of human experiences not shared by others, the exclusion of public and quasi-public employees takes on an invidious aspect. To quote Justice Marshall, the result of their deliberate exclusion ". . . is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable", thereby depriving the jury ". . . of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters* v. *Kiff, supra,* 407 U.S. at 504, quoted with approval in *Taylor* v. *Louisiana, supra,* 419 U.S. at 532, fn. 12.[10]

It remains only to note that a rational basis for § 598 is not furnished by the State's contention that, because *some* grand juries are *occasionally* assigned investigative functions (*e.g.,* official corruption inquiries), as contrasted with their normal role of determining whether or not to indict in specific cases, public employees as a class can be excluded from *all* grand jury service. If, as the legislative history of § 598 indicates (see, Appellee Br. 14-15), the sole purpose of that statute was to exclude certain public employees from occasional grand jury inquiries involving official corruption, then the exclusion readily can and must be limited to such instances, else the statute is constitu-

[10] As observed in *Taylor* (*supra,* 419 U.S. at 527-532), the above-quoted reasoning in *Peters* supports the historic conclusion that the "exclusion" of any identifiable and distinct group violates the constitutionally guaranteed fair cross-sectional jury requirement. See, *Peters* v. *Kiff, supra,* 407 U.S. 493; *Alexander* v. *Louisiana,* 405 U.S. 625 (1972); *Brown* v. *Allen,* 344 U.S. 443, 447 (1953); *Pierre* v. *Louisiana,* 306 U.S. 354, 358, 362 (1939). Yet, in *Castaneda* the dissent concluded that the cross-sectional requirement does not extend to State grand juries (*supra,* 45 L.W. at 4309), though cases like *Peters, Alexander, Brown* and *Pierre,* to name just a few, had held otherwise. The majority in *Castaneda* did not respond or comment.

tionally infirm. See, *Quadra* v. *Superior Ct. of City and Cty. of San Francisco,* 403 F. Supp. 486, 490-493 (N.D. Calif. 1975).

More importantly, New York statutorily provides for *individualized grand jury* disqualification or excuse on a case-by-case, inquiry-by-inquiry, basis for the same reason a petit juror may be disqualified or excused. E.g., N.Y. Criminal Procedure Law § 190.20(2); N.Y. Judiciary §§ 593(1), 609(4); Rules, N.Y. App. Div., 1st Dept. § 620.24.[11] Such an *individualized* approach to disqualification is essential for "[j]ury competence is an individual rather than a group or class matter." *Thiel* v. *Southern Pacific Co., supra,* 328 at 220. *Accord, Taylor* v. *Louisiana, supra,* 417 U.S. at 534. And it is no answer for the State to assert (Appellee Br. 19) that administrative convenience excuses the vast sweep of the absolute exclusion statutorily decreed, particularly if, as the State now contends (*Id.* at 14-15), its arguably legitimate purpose is far more circumscribed. *Taylor* v. *Louisiana, supra,* 419 U.S. at 534-35. *See also, Cleveland Board of Education* v. *LeFleur,* 414 U.S. 632 (1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972).[12]

The foregoing response to the State's rational basis defense of § 598 assumes that rational basis is the governing standard. Appellants maintain that, while § 598 does not

[11] "The Court may excuse a grand juror or may discharge any person from serving as a grand juror in the same cases in which a trial juror may by law be discharged or excused." Rules, N.Y. App. Div. 1st Dept. § 620.24.

[12] The State seemingly *agrees* that § 598 can *not* be defended based on the essentiality of the "particular occupations" engaged in by all Federal, State, Local and other public employees (ranging from porters to clerks). Were the entire class critical or essential the State would not have concluded that, with specific exceptions (*e.g.,* policemen and firemen), these *self-same* public employees are *all* required to render petit jury service. See, *Labat* v. *Bennett,* 365 F.2d 698 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967).

survive even rational basis scrutiny, a stricter standard applies. We argue that once standing and related threshold requirements (e.g., the exclusion of an identified or identifiable class) have, as here, been met, then strict scrutiny is required and the State must show that the exclusion serves some compelling State interest.

In *Taylor* v. *Louisiana, supra,* 419 U.S. at 534, this Court recently concluded, in a petit jury context, that "[t]he right to a proper jury cannot be overcome on merely rational grounds"—"weightier reasons" must then be shown to support the exclusion. *Taylor,* following with approval *Peters* v. *Kiff*—a grand jury case—, recognized the standing of a criminal defendant to challenge the exclusion of groups of which he is not a member. See, *supra,* p. 5, fn. 5. In *Castaneda,* the dissent maintained that the constitutional protections accorded in grand jury contexts are different from and more strict than those applied to petit jury selection, as applied in *Taylor. Supra,* 45 L.W. 4309-10. That view seemingly was not shared by the *Castaneda* majority. *Supra,* 45 L.W. at 4305, fns. 12-13, 4307. In any event, we here suggest that regardless of the strictness of standing and related threshold criteria that must be met, once the defendant has shown that he has been prejudiced by the exclusion of an identifiable group—here, *all* of his peers—, the State assumes the burden affirmatively to support the challenged exclusion and the State's proffered rationale must be strictly scrutinized. Any other rule would fail to give adequate protection to the right of a criminal defendant to indictment by an *impartial* jury, a right which automatically attaches once the State opts to use the grand jury system.

Appellants' view accords with numerous holdings of this Court, reached in a grand jury context.[13] ". . . [I]f a state

[13] E.g., *Peters* v. *Kiff, supra,* 407 U.S. 493; *Alexander* v. *Louisiana, supra,* 405 U.S. 625, 635-37; *Carter* v. *Jury Commission of Greene County, supra,* 396 U.S. at 330; *Pierre* v. *Louisiana, supra,* 306 U.S. 358, 362.

chooses, quite apart from [federal] constitutional compulsion, to use a grand or petit jury, due process [as well as equal protection] imposes limitations on the composition of that jury." *Peters* v. *Kiff, supra,* 407 U.S. at 501.[14] It then follows, as this Court held decades ago in *Pierre* (*supra,* 306 U.S. at 358), that because "[i]ndictment by Grand Jury and trial by jury cease to harmonize with traditional concepts of justice at the very moment particular groups, classes or races . . . are excluded from jury service", the State must show that a compelling interest supports such exclusion. Here, no such showing is even attempted.

III.

The Commerce Clause—Supremacy Issues.

The State's response to appellants' Commerce Clause—Federal Supremacy Doctrine argument misses the mark. We do not contend that upon their face the State penal statutes (N.Y. Penal Law §§ 145.20, 195.05) conflict with Federal law. The State penal statutes govern a variety of wrongs, most of them having nothing at all to do with bridges over navigable waterways. Our quarrel is with the State penal statutes *as applied.*

The State had determined *not* to invoke the Taylor anti-strike law (N.Y. Civil Service Law § 200 *et seq.*) to enjoin appellants' job action, which would leave the bridges unattended. Appellants, thus freed to proceed with their demonstration, were, however, cautioned that Federal law and regulation (33 U.S.C. § 499, 33 C.F.R. 117) *mandated* that the draws of the bridges not be permitted to obstruct free passage of watercraft. To comply with that mandate, before leaving their posts, appellants opened the draws of only those bridges spanning navigable waterways. They were indicted for that and nothing else.

[14] See, e.g., *supra,* fn. 13.

The conflict is apparent. As applied herein and as interpreted by the State Courts (as a matter of first impression), the State penal strictures made opening of the bridges a crime (Appendix F, 75a-77a, 81a). Under Federal law, failure to do so was a crime.

Where State legislation conflicts, by its terms *or as applied,* with Federal law or regulation, particularly in the area of navigation or trade, the State law must give; and that is especially true here, since the instant Federal statute was expressly enacted to ensure precisely that result with respect to drawbridges over navigable waterways. See, Jurisdictional Statement, 18-19.

Conclusion

For each of the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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